INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes and rule involved	3
Statement	3
Reasons for granting the writ	8
Conclusion	19
Appendix	20

CITATIONS

Cases:

Ackert v. *Baltimore & O. R. Co.*, 115 F. 2d 455, certiorari denied, 311 U. S. 717	2
Commissioner v. *Sunnen*, 333 U. S. 591	11, 17
Lehigh Valley R. Co., In re, 34 F. Supp. 750	15
Lehigh Valley R. Co., In re, 41 F. Supp. 97	15

Statutes:

Bankruptcy Act of 1898, c. 541, 30 Stat. 544, as amended (11 U. S. C. 1 *et seq.*):	
Chapter VIII (Section 77)	10
Chapter X (Secs. 101-276)	10
Chapter XI (Secs. 301-399)	10
Chapter XII (Secs. 401-526)	10
Chapter XV (as added by the Act of October 16, 1942, c. 610, 56 Stat. 787)	3
Section 700	20
Section 705	20
Section 706	14, 20
Section 710	20
Section 713	2, 24
Section 714	25
Section 715	25
Section 722	25
Section 725	14, 26
Section 726	29
Section 736	30
Section 737	31
Section 738	13, 15, 31
Section 745	31
Section 746	14, 15, 31
Section 755	10, 32

Internal Revenue Code:

	Page
Section 53	13, 32
Section 56	32
Section 271	13, 33
Section 272	15, 16, 34
Section 274	13, 14, 15, 35
Section 275	13, 37
Section 729	13, 37
Judicial Code, Section 266	2
28 U. S. C. 2201	16, 37

Miscellaneous:

Federal Rules of Civil Procedure, Rule 60	18, 38

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 149

THE UNITED STATES OF AMERICA, PETITIONER

v.

THE COLORADO AND SOUTHERN RAILWAY COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the specially-constituted District Court for the District of Colorado entered in the above entitled case on April 29, 1949.

OPINION BELOW

The findings of fact, conclusions of law and judgment of the District Court (R. 241-264) are reported in 84 F. Supp. 134.

JURISDICTION

The judgment of the District Court was entered on April 29, 1949 (R. 263-264). The jurisdiction of this Court is invoked under the provisions of

Section 745 of the Bankruptcy Act of 1898 (Appendix, *infra* p. 31.)

QUESTIONS PRESENTED

On March 9, 1943, the specially-constituted District Court [1] by decree approved a plan of adjustment of the indebtedness of The Colorado and Southern Railway Company (hereinafter referred to as "taxpayer") under Chapter XV of the Bankruptcy Act. On that date there were no taxes owing to the United States, and the court so found. Future income and excess profits taxes for 1942 and 1943 could not be determined and assessed until after the taxpayer's returns for those years were filed, respectively, on or about March 15, 1943, and March 15, 1944. In 1946 the taxpayer was advised of a proposed assessment of taxes for 1942 and 1943, aggregating $3,001,061.75, plus interest. It petitioned the District Court to declare the Secretary of the Treasury estopped to assess the 1942 and 1943 taxes and to determine its correct tax liability for those years. The District Court assumed jurisdiction and decided that its former decree was *res judicata* (1) that no taxes were due for the year 1942 and (2) that certain data, computations, deductions and carryovers as reported in the taxpayer's 1940, 1941, and 1942 returns were correct and

---

[1] Under Section 713 of the Bankruptcy Act (Appendix, *infra*, pp. 24-25), the special court consisted of three judges convened as provided in Section 266 of the Judicial Code, as amended. The nature of the special court is discussed in *Ackert* v. *Baltimore & O. R. Co.*, 115 F. 2d 455 (C. A. 4), certiorari denied, 311 U. S. 717.

consequently must be used in computing the 1943 tax liability. The questions are:

1. Whether the District Court had jurisdiction to render a judgment as to the taxpayer's liability for a proposed assessment of 1942 and 1943 taxes.

2. If it had jurisdiction to do so as to either or both years, whether the former decree is *res judicata* that the taxpayer owes no taxes for 1942 and that the data, computations, deductions, and carryovers shown on its returns for 1940, 1941, and 1942 were correct and must be used in computing tax liability for 1943.

STATUTES AND RULE INVOLVED

The relevant statutory provisions and rule are printed in the Appendix, *infra,* pp. 20-38.

STATEMENT

The findings of fact and conclusions of law of the District Court may be summarized as follows:

On November 9, 1942, taxpayer filed a petition for approval and confirmation of a plan of adjustment under Chapter XV of the Bankruptcy Act of 1898, as added by the Act of October 16, 1942, c. 610, 56 Stat. 787 (R. 241). A hearing was held thereon on March 3-4, 1943 (R. 247-248). The Secretary of the Treasury was given notice of the filing of the petition and of the date for hearing (R. 241-242). The petition alleged (R. 10, par. 23) that so far as the petitioner (taxpayer) had knowledge, the

United States was not a creditor of petitioner on claims for taxes and no claims for taxes were affected by the plan. The United States made an investigation before the hearing, filed no claims for taxes or other items, and did not appear at the hearing. (R. 243-244, 247.) On March 8, 1943, the court entered findings of fact, conclusions of law, and decree approving and confirming the plan of adjustment (R. 75-105), in which it made a finding that the United States is not a creditor of the petitioner (taxpayer) on claims for taxes and that it was not affected by the plan (R. 97). Among other things, the plan extended the dates of maturity of certain obligations of the taxpayer and of some of its subsidiary companies; reduced the interest rate on all mortgage bonds and made parts of the interest payable only if earned; deprived all stockholders of the right to dividends; restricted the earnings which could be used for capital expenditures; and provided for the application of all remaining income to reduce the taxpayer's indebtedness of about $45,000,000. The plan became retroactively effective on November 1, 1941, and was to remain in effect until November 1, 1954, if the taxpayer remained solvent and performed its obligations under the plan. (R. 80-95.)

Prior to the decree approving the plan, the taxpayer had filed its consolidated income and excess profits tax returns for the years 1940 and 1941 on March 14, 1941, and March 16, 1942, respectively. Neither return showed any tax liability. The Com-

missioner has never asserted, and does not now claim, deficiencies in taxes for these years. The returns for both years showed a certain amount as a net operating loss which could be carried over as a deduction in computing net income for the succeeding two years; and an amount as an unused excess profits credit which could be carried over and deducted in computing adjusted excess profits net income for the succeeding two years. (R. 242-243.) On March 12, 1943, the taxpayer filed amended income tax returns for 1940 and 1941, in which it showed an increase in the net operating loss carryover deductions for the ensuing two years (R. 244).

On March 15, 1943, after approval of the plan of adjustment, the taxpayer filed consolidated income and excess profits tax returns for 1942, showing no tax liability. On the returns deductions were made of the net operating loss carryovers and the unused excess profits credit carryovers as shown on the 1940 and 1941 amended returns, and a net operating loss and an unused excess profits credit were shown as carryovers for deduction in computing net income and excess profits net income for the following two years. Deductions for depreciation and retirements of road property and structures were claimed in 1942 on the same basis as in the 1940 and 1941 returns, and equity invested capital was computed on the same basis as in the 1940 and 1941 returns. (R. 244-245.) On August 13, 1943, the taxpayer filed an amended

consolidated income tax return for 1942, which still showed no tax liability, but in which the net operating loss carryover deduction for the following year and the unused excess profits credit carryover for the following two years were reduced (R. 246-247).

On March 15, 1944, the taxpayer filed consolidated income and excess profits tax returns for 1943, which showed an income tax liability of $3,264,470.45, which was paid, and no excess profits tax liability. Deductions were taken of the net operating loss carryover and unused excess profits credit carryover as shown on the 1942 amended return. Deductions for depreciation and retirements were taken and equity invested capital was computed on the same basis as in the former years. (R. 249-250.)

On September 17, 1946, the Internal Revenue Agent in Charge gave notice to taxpayer of proposed additional taxes aggregating $3,001,061.73, plus interest, for 1942 and 1943. The proposed assessments were based on reductions of the deductions claimed in the returns for depreciation and retirements of road property and structures, reductions of the net operating loss carryovers from 1940, 1941, and 1942, and reductions in the equity invested capital reported in the 1940, 1941, 1942, and 1943 returns, and in the unused excess profits credit carryovers from 1940, 1941, and 1942. The taxpayer filed a protest against the proposed taxes but no settlement was reached. (R. 251-252.)

On October 4, 1948, the taxpayer filed a supplemental petition with the special District Court, in which it prayed that the Secretary of the Treasury be held estopped to assess the proposed additional taxes and that it be adjudged that no taxes are due for the years 1942 and 1943 (R. 106-119). After hearing, the District Court held that it had jurisdiction over the subject matter of the petition in order to protect the taxpayer and its property against action inconsistent with the plan of adjustment and to protect the rights of the parties under the plan. The court stated as facts that in giving its approval to the plan it relied on the figures reported in the 1940, 1941, and 1942 returns as being correct; that had the United States informed it of the determined changes in these figures, it could not have approved the plan without drastic alterations; and that assessment and collection of the proposed 1942 and 1943 taxes would jeopardize the effective execution of the plan and be unjust to the parties to the plan. It held that the United States was a creditor for 1942 taxes at all times after December 31, 1942, and that it had a duty to claim the 1942 taxes before the decree approving the plan on March 8, 1943, or in any event within six months thereafter, so that the 1942 taxes, if found to be legally due, could have been provided for in a modification of the plan of adjustment, if found practicable, feasible, and financially advisable; that the court's decree of March 8, 1943, was an adjudication, binding on the United States, that no taxes

were due to the United States for the year 1942; and that the United States is estopped and barred from assessing and collecting any income or excess profits taxes for the year 1942. The court held further that the United States had the duty to present to the court, for consideration in connection with approval of the plan, any changes the Commissioner of Internal Revenue proposed to make on the returns for the years 1940, 1941, and 1942 in the methods of computing depreciation and retirement deductions and equity invested capital and in the net operating loss carryovers and unused excess profits carryovers there reported, which would increase the taxes thereafter to be paid; that having failed to do so, its decree was an adjudication that no changes in these items as reported on the 1940, 1941, and 1942 returns were to be made; that the United States is estopped to make any changes in these items; and that in determining the liability of the taxpayer for 1943 taxes there shall be used the amounts of equity invested capital, net operating loss carryover deduction from 1942, excess profits credit, and unused excess profits credit carryover from 1941 and 1942 as set out in paragraph 2 of its judgment entered April 29, 1949. (R. 258-263.)

REASONS FOR GRANTING THE WRIT

1. The District Court's judgment in this case raises questions which are of importance in the administration of the tax law. The court's as-

sumption of jurisdiction to render a declaratory judgment disposing of proposed assessments for taxes, which were not determinable under the revenue laws (see *infra*, pp. 13-14) until after the entry of the decree approving the plan, on the basis of the supposed *res judicata* effect of that decree, results in nullifying the provisions governing assessment of income and excess profits taxes in the Internal Revenue Code (see *infra*, pp. 13-14) and consequently disrupts the established administrative procedure in that respect. To protect the revenue, it is essential that this Court review the case so that the Commissioner of Internal Revenue may know finally whether the provisions of the revenue laws in respect of assessment of future taxes are not applicable in proceedings under Chapter XV and other related chapters of the Bankruptcy Act.

Furthermore, the judgment places upon the United States the apparent duty of appearing in proceedings in which it does not submit a claim and by which it is not affected, for the purpose of advising the court of any changes to be made by the Commissioner of Internal Revenue of matters reported in tax returns already filed which will affect the liability for taxes in future years, at penalty of being thereafter barred from making such changes. If such a rigorous duty is to be imposed on the Commissioner of Internal Revenue in proceedings where the United States is not a party, it should be declared by this Court.

While these two questions are not of continuing importance in connection with proceedings under Chapter XV of the Bankruptcy Act since that chapter is no longer in effect except in the case of proceedings initiated by the filing of a petition before November 1, 1945 (Sec. 755, Appendix, *infra*, p. 32), nevertheless the same questions may arise in other cases in which taxes become due after a plan of arrangement of indebtedness or a plan of reorganization has been approved or confirmed under other chapters of the Bankruptcy Act; for example, under Section 77 (11 U. S. C. 1946 ed., Sec. 205), dealing with railroad reorganizations; under Sections 101-276 (Chapter X) (11 U. S. C. 1946 ed., Secs. 501-676), dealing with corporate reorganizations; under Sections 301-399 (Chapter XI) (11 U. S. C. 1946 ed., Secs. 701-799) dealing with plans for arrangement of unsecured debts; and under Section 401-526 (Chapter XII) (11 U. S. C. 1946 ed., Secs. 801-926), dealing with plans for arrangement of debts secured by real property. The probable recurrence of the questions in proceedings under other chapters contributes to their importance and warrants authoritative determination by this Court.

The court's holding that its former findings of fact, conclusions of law, and decree, which stated only that the United States was not a creditor for taxes as of that date and was not affected by the plan (and thus was not a party thereto), were *res*

judicata as to liability for 1942 taxes not determinable until after its date and as to matters contained in returns already filed which affected the future 1943 tax liability is of importance in the administration of the tax laws generally. The holding would seem applicable to every kind of tax case, and, if followed, the result would be that neither the Commissioner for administrative purposes, nor other courts considering a taxpayer's liability for other tax years, could rely on the terms of the findings, opinion, and judgment as showing what matters relating to tax liability were adjudicated therein; instead they would have to ask the court which rendered such findings, opinion, and judgment for a declaratory judgment as to what matters were adjudicated by it. The inconvenience and error of any such rule are obvious. It would also seriously disturb the administrative process if the United States were to be considered estopped by a judgment to which it was not a party, as the court held here. Moreover, as will be developed, *infra*, pp. 17-18, in employing the doctrine of estoppel by judgment against the United States, which was not a party to the judgment, as to matters not in issue and not referred to in the previous findings of fact, conclusions of law, and decree, the District Court disregarded this Court's exposition of the law of estoppel by judgment in *Commissioner* v. *Sunnen*, 333 U. S. 591, 598. If the doctrine of *res judicata* is to be so changed, it may be done

only by this Court. Administrative necessity requires that this question be resolved.

Not only does the *res judicata* holding of the District Court bar the substantial taxes proposed for 1942 and 1943 ($3,001,061.73 plus interest of $960,818 computed to January 1, 1949) without there having been an adjudication on the merits that they are not due, but if the judgment goes unchallenged, it is apparent that the court will consider this judgment an authority for making similar declaratory judgments on the doctrine of *res judicata* in respect of the tax liability accruing for all years after 1943 during the life of the plan (1944-1945, inclusive). Thus, the United States may be deprived of its statutory rights to assess and collect the taxes due from this taxpayer during the high profit war years and thereafter without ever having a determination on the merits that the taxes are not legally due. The importance to the revenue of having the present decision reviewed is thus emphasized.

2. In assuming jurisdiction to entertain the supplemental petition and to adjudicate the taxpayer's liability for taxes for 1942 and 1943, the District Court erroneously disregarded or misconstrued controlling statutory provisions. This Court should review the case in order that these provisions of law may be applied properly.

On the date when the plan of adjustment was approved, the taxpayer's returns for 1942 had not

been filed and the last day on which they could be filed (March 15, 1943) had not arrived. Section 53(a)(1), Internal Revenue Code (Appendix, *infra*, p. 32). The Commissioner of Internal Revenue was not authorized to determine and assess any tax for 1942 until after the return was filed on March 15. See Sections 271, 275 (a), and 729 (a) of the Internal Revenue Code (Appendix, *infra*, pp. 33-34, 37). There is no provision in Chapter XV of the Bankruptcy Act which alters this procedure. Although Section 738 (Appendix, *infra*, p. 31) provides that an order approving the debtor's petition shall have the effect of an adjudication of bankruptcy for purposes of Section 274 of the Internal Revenue Code, Section 274 (a) (Appendix, *infra*, pp. 35-36) provides only that a "deficiency" determined by the Commissioner shall be immediately assessed upon an adjudication of bankruptcy of the taxpayer. The section refers to deficiencies determined prior to the adjudication and in Chapter XV cases prior to the order approving the petition. Here it was not possible for the Commissioner to have determined a "deficiency", as defined in Section 271, for 1942 until after the return had been filed on March 15, 1943. Similarly, no "deficiency" for 1943 could be determined by the Commissioner until after the returns for that year had been filed on March 15, 1944, which was approximately a year after the plan of adjustment had been approved by the court. Thus, the proposed taxes for 1942 and 1943 could not even have

been determined prior to the filing of the returns and the District Court's holding that the United States became a creditor on December 31, 1942, for all 1942 taxes disregards the provisions of the Internal Revenue Code just discussed. Cf. concurring opinion of Judge Symes. Indeed, it may be doubted that the proposed taxes could be regarded as debts due the United States prior to their assessment which has been prevented by the judgment herein. Cf. Section 274 (a), Internal Revenue Code.

After entry of its decree approving the plan, the jurisdiction of the special court, as defined in Section 746 of the Bankruptcy Act (Appendix, *infra*, pp. 31-32), is to protect and enforce the rights of parties under the plan and the orders of the court thereon, if the court retains such jurisdiction in its final decree. The special court in this case erroneously construed this limited jurisdiction as including the power to adjudicate taxes accruing against the debtor in the normal course of business after approval of the plan. Such taxes are not affected by the plan and the plan is not binding as to them (see Sections 706 and 725 (Appendix, *infra*, pp. 20, 26-29)). It follows that the jurisdiction to protect the rights of parties to the plan does not extend to later tax claims which have no connection with the plan or the rights of parties under it. They arise from business transactions not controlled by the plan and, as to 1943, occurring for the most part after the plan had been adopted. Cf. *In re Lehigh*

Valley R. Co., 41 F. Supp. 97 (E. D. Pa.) in which a special court constituted under Chapter XV of the Bankruptcy Act held that it had no jurisdiction over a petition to require an attorney, claiming a fee in connection with a Mixed Claims Commission award, to have his claim adjudicated by the special court where the plan, which was prepared and filed before the award was made (see prior opinion in 34 F. Supp. 750 (E. D. Pa.)), did not deal with the award or the attorney's fee to be paid. The assumption of jurisdiction over subsequently arising tax liability is particularly unwarranted because it interferes with the jurisdiction of other tribunals. Under Section 272 (a) of the Internal Revenue Code (Appendix, *infra*, pp. 34-35) upon receipt of formal notice of deficiencies the debtor could have contested in the Tax Court the validity of the proposed assessment, or after paying the tax could have sued to recover it in the Court of Claims or the appropriate District Court. Section 738 of the Bankruptcy Act gives the special court power to determine the amount and legality of claims of the United States for taxes and to order payment thereof but this patently refers to taxes due or assessed under Section 274 (a) of the Internal Revenue Code before the plan has been confirmed, since Section 746 defines the limits of the court's jurisdiction after that time.

The special court attempted to sustain its jurisdiction as to both 1942 and 1943 on the theory that its decree approving the plan was *res judicata* of matters requiring the conclusion that the proposed taxes for those years were not due. In so doing it rendered a declaratory judgment in respect of federal taxes contrary to 28 U. S. C., Sec. 2201 (Appendix, *infra,* pp. 37-38). Since the 90 day notice of deficiencies as provided in Section 272 (a) of the Internal Revenue Code had not been sent to the taxpayer, and the taxes had not been assessed, the proposed taxes were in a preliminary administrative stage only and were not yet justiciable. Instead of leaving the question of whether its former decree was *res judicata* of the proposed 1942 and 1943 taxes to be settled by the proper tribunal when the proposed tax liabilities had progressed to a justiciable stage, the special court declared that its former decree was conclusive as to liability for the proposed taxes. That this amounts to a declaratory judgment is apparent, and particularly as to 1943. For that year the special court declared its former decree *res judicata* of the correctness of certain items as reported in the returns for 1940-1942, inclusive, and directed that these figures must be used by the United States in computing the tax liability for 1943.

3. The District Court's application of the doctrine of *res judicata* in this case is in substantial

conflict with *Commissioner* v. *Sunnen,* 333 U. S. 591. In that case this Court stated (p. 598) that a judgment in a prior cause of action will operate as an estoppel against the parties to the action only as to matters in issue or points controverted upon the determination of which the judgment was rendered. Here the debtor's petition for approval of its plan of adjustment of indebtedness filed November 9, 1942, alleged that the United States was not its creditor on claims for taxes and that no claims for taxes were affected by the plan. This allegation was not controverted by the United States, since it filed no claims for taxes and did not enter an appearance in the proceeding. In its findings of fact, conclusions of law, and decree entered March 8, 1943, the District Court found therefore that the United States was not a creditor for taxes (as of that date) and that it was not one of the claimants affected by the plan. Despite the facts that the United States was not a party to the proceeding and that the only matter put to the court, and to all indications decided in the early decree, was whether the United States was a creditor for taxes at that time, the District Court held that the decree was *res judicata,* that there was no liability for the 1942 tax which first became determinable by the Commissioner after the date of the decree,[2] and

---

[2] It has already been shown that the special court erroneously held that the United States became a creditor for the

that the data and computations reported in the 1940, 1941, and 1942 returns in so far as they affected 1943 tax liability were correct. The conflict with the rule stated in the *Sunnen* case is apparent. The application of *res judicata* is especially unjust since the early findings, conclusions, and decree contain nothing to suggest to the Commissioner, who was not a party and did not appear at the hearing, that the court was determining the liability for 1942 taxes which were not then due or was approving figures and computations in the returns already filed for use in computing the future 1943 tax liability. The doctrine of *res judicata* has the purpose of preventing a relitigation between the same parties of the same claim or issue. Here the special court applied the doctrine to prevent even a first litigation of the 1942 and 1943 tax liability between the United States and the taxpayer.

1942 taxes on December 31, 1942. This erroneous view was the principal reason for concluding that its decree of March 8, 1943, was *res judicata* that no tax for 1942 was due. But the court premised its holding of *res judicata* as to 1942 alternatively on the failure of the United States to apply for a revision of the decree to show the 1942 liability within six months thereafter under Rule 60 of the Federal Rules of Civil Procedure (Appendix, *infra*, p. 38). But Rule 60 was erroneously used by the court to bolster its decision. Even assuming, *arguendo* only, that it is pertinent in connection with a decree approving a plan of adjustment under the Bankruptcy Act, the circumstances for its application are not present in this case. The United States was not a party to the proceeding in which the decree was rendered, there was no judgment against the United States, and in any event the finding that the United States was not a creditor for taxes on March 8, 1943, was not the result of mistake, inadvertence, surprise, or inexcusable neglect, so as to permit a motion for relief from the decree under the rule.

CONCLUSION

Since the judgment of the special court raises important administrative questions, and since it is erroneous, is in disregard of controlling provisions of law, and is in conflict with a decision of this Court, the petition for a writ of certiorari should be granted.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

JUNE, 1949.

APPENDIX

Bankruptcy Act of 1898, c. 541, 30 Stat. 544: Chapter XV—Railroad Adjustments, as added by Act of October 16, 1942, c. 610, 56 Stat. 787:

SEC. 700. In addition to the jurisdiction otherwise exercised, courts of bankruptcy shall exercise original jurisdiction, as provided in this chapter, for postponements or modifications of debt, interest, rent, and maturities or for modifications of the securities or capital structures of railroads.

SEC. 705. The following terms, as used in this chapter, unless a different meaning is plainly required by the context, shall be construed as follows:

* * * * *

(4) "Creditors" shall include all holders of claims, demands, and obligations of whatever character against the petitioner or its property, whether or not such claims would otherwise constitute provable claims in bankruptcy, including the holders of claims made, assumed, or guaranteed by the petitioner.

* * * * *

SEC. 706. No creditor shall be deemed to be "affected" by any plan unless such plan proposes a modification of the evidence of debt or other instrument defining the rights of such creditor, or a modification of the security, if any, for the claim of such creditor.

SEC. 710. Any railroad corporation not in equity receivership or in process of reorgani-

zation under section 77 of the Bankruptcy Act at the time of filing its petition hereunder, and which has not been in equity receivership or in process of reorganization under said section 77 within ten years prior to the filing of such petition, which shall have—

(1) prepared a plan of adjustment and secured assurances satisfactory to the Commission of the acceptance of such plan from creditors holding at least 25 per centum of the aggregate amount of all claims affected by said plan of adjustment (including all such affected claims against said corporation, its parents, and subsidiaries); and

(2) thereafter obtained an order from the Commission (but not of a division thereof) under section 20a of the Interstate Commerce Act authorizing the issuance or modification of securities (other than securities held by, or to be issued to, Reconstruction Finance Corporation) as proposed by such plan of adjustment as filed, or as modified by, or with the approval of, the Commission, such order of the Commission to include also specific findings—

(a) that such corporation is not in need of financial reorganization of the character provided for under section 77 of this Act;

(b) that such corporation's inability to meet its debts matured or about to mature is reasonably expected to be temporary only; and

(c) that such plan of adjustment, after due consideration of the probable prospective earnings of the property in the light of its earnings experience and of such changes as may reasonably be expected—

(i) is in the public interest and in the best interests of each class of creditors and stockholders;

(ii) is feasible, financially advisable, and not likely to be followed by the insolvency of said corporation, or by need of financial reorganization or adjustment;

(iii) does not provide for fixed charges (of whatsoever nature including fixed charges on debt, amortization of discount on debt, and rent for leased roads), in an amount in excess of what will be adequately covered by the probable earnings available for the payment thereof;

(iv) leaves adequate means for such future financing as may be requisite;

(v) is consistent with adequate maintenance of the property; and

(vi) is consistent with the proper performance by such railroad corporation of service to the public as a common carrier, will not impair its ability to perform such service:

Provided, That in making the foregoing specific findings the Commission shall scruti-

nize the facts independently of the extent of acceptances of such plan and of any lack of opposition thereto: *Provided further*, That an order of the Commission (or of a Division thereof) under section 20a of the Interstate Commerce Act, made prior to the effective date of this chapter, authorizing the issuance or modification of securities as proposed by a plan of adjustment (other than securities held by, or to be issued to, Reconstruction Finance Corporation), shall be effective for the purpose of this subparagraph (2) of the first sentence of section 710, notwithstanding failure to include therein the foregoing specific findings, if such order did include the specific findings that such proposed issuance or modification of securities is compatible with the public interest, is consistent with the proper performance by the railroad corporation of service to the public as a common carrier, and will not impair its ability to perform such service; and

(3) secured assents to such plan of adjustment or such plan of adjustment as modified by, or with approval of, the Commission, by creditors holding more than two-thirds of the aggregate amount of the claims affected by said plan, which two-thirds shall include at least a majority of the aggregate amount of the claims of each affected class, may file in the United States district court in whose territorial jurisdiction such railroad corporation has had its principal executive or principal operating office dur-

ing the preceding six months or a greater period therof, its petition averring that it is unable to meet its debts, matured or about to mature, and desires to carry out the plan of adjustment.

A copy of the order obtained from the Commission, as above provided, shall be filed with the petition and made a part thereof.

* * * * *

SEC. 713. Immediately following the filing of the petition, there shall be convened a special court of three judges in the manner provided by section 266, as amended, of the Judicial Code, and thereafter all proceedings relative to such plan or any modification thereof shall be conducted before such court. Such three-judge court shall be vested with and shall exercise all the powers of a district court sitting in equity and all the powers as a court of bankruptcy necessary to carry out the intent and provisions of this chapter, including the classification of claims at such time and in such manner as the court may direct: *Provided, however,* That any one of the three judges constituting the special court who may be designated by the special court, may perform all functions, conduct all proceedings, and enter all orders, except that such single judge shall not hold a hearing for approval of a plan as provided in section 720 or for confirmation of a plan as provided in section 725 or enter the final decree. Any act of a single judge hereby permitted shall be subject to review by the special court on application by

any party in interest filed within thirty days after said act or by order of such court on its own motion made within such period of thirty days.

SEC. 714. The special court, after hearing, promptly shall enter an order approving the petition as properly filed under this chapter if satisfied that such petition complies with this chapter and has been filed in good faith, or dismissing such petition if not so satisfied.

SEC. 715. If the petition is approved by the special court, the said court, during the pendency of the proceedings under this chapter, shall have exclusive jurisdiction of the petitioner and of its property wherever located to the extent which may be necessary to protect the same against any action which might be inconsistent with said plan of adjustment or might interfere with the effective execution of said plan if approved by the court, or otherwise inconsistent with or contrary to the purposes and provisions of this chapter: *Provided, however,* That nothing herein contained shall be construed to authorize the court to appoint any trustee or receiver for said properties or any part thereof, or otherwise take possession of such properties or control the operation or administration thereof.

* * * * *

SEC. 722. If the United States or any agency thereof, or any corporation (other than the Reconstruction Finance Corporation) the majority of the stock of which is owned by the

United States, is a creditor or stockholder, the Secretary of the Treasury is hereby authorized to act in respect of the interests or claims of the United States or of such agency or other corporation. If in any proceeding under this chapter the United States is a creditor on claims for taxes or customs duties (whether or not the United States has any other interest in or claim against the debtor as creditor or stockholder), no plan which does not provide for the payment thereof shall be approved or confirmed by the court except upon the acceptance of a lesser amount or of a postponement by the Secretary of the Treasury certified to the court: *Provided,* That if the Secretary of the Treasury shall fail to accept or reject such lesser amount or such postponement for more than sixty days after receipt of written notice so to do from the court, accompanied by a certified copy of the plan, the consent of the United States insofar as its claims for taxes or customs duties are concerned shall be conclusively presumed.

SEC. 725. If the special court shall find—

(1) that, at the time of the filing of said petition as provided in article III hereof, the proposed plan of adjustment had been assented to by not less than two-thirds of the aggregate amount of all claims of the petitioner affected by such plan, including at least a majority of the aggregate amount of claims of each such class;

(2) that the plan of adjustment as submitted or as modified by the court has been

accepted as submitted or, if modified, then as modified by or on behalf of creditors affected by such plan holding more than three-fourths of the aggregate amount of the claims affected by said plan, including at least three-fifths of the aggregate amount of the claims of each affected class;

(3) that the plan meets the requirements of clause (c), and the petitioner meets the requirements of clauses (a) and (b) of subparagraph (2) of the first sentence of section 710, and that the plan is fair and equitable as an adjustment and as such will: (a) afford due recognition to the rights of each class of creditors and stockholders and fair consideration to each class adversely affected and (b) will conform to the law of the land regarding the participation of the various classes of creditors and stockholders: *Provided,* That in making the findings required by this clause (3), the court shall scrutinize the facts independently of the extent of acceptances of such plan, and of any lack of opposition thereto, and of the fact that the Commission, under section 20a of the Interstate Commerce Act, has authorized the issuance or modification of securities as proposed by such plan, and of the fact that the Commission has made such or similar findings;

(4) that all corporate action required to authorize the issuance or modification of securities pursuant to such plan shall have been duly taken either before or since the enactment of this chapter;

(5) that the petitioner has not, in connection with said plan or the effectuation thereof, done any act or failed to perform any duty which act or failure would be a bar to the discharge of a bankrupt, and that the plan and the acceptance thereof are in good faith and have not been made or procured by any means, promises, or acts forbidden by this Act;

(6) that, after hearings for the purpose, all amounts or considerations, directly or indirectly paid or to be paid by or for the petitioner for expenses, fees, reimbursement, or compensation of any character whatsoever incurred in connection with the proceeding and plan, or preliminary thereto or in aid thereof, together with all the facts and circumstances relating to the incurring thereof, have been fully disclosed to the court so far as such amounts or considerations can be ascertained at the time of such hearings, that all such amounts or considerations are fair and reasonable, and to the extent that any such amounts or considerations are not then ascertainable, the same are to be so disclosed to the court when ascertained, and are to be subject to approval by the special court as fair and reasonable, and except with such approval no amounts or considerations covered by this clause (6) shall be paid; and

(7) that the provisions of sections 722, 736, and 737 of this chapter have been complied with.

Said court shall file an opinion setting forth its conclusions and the reasons therefor and shall enter a decree approving and con-

firming such plan and the adjustment provided thereby, which decree shall be binding upon the petitioner and upon all creditors and security holders of the petitioner; and thereafter the petitioner shall have full power and authority to and shall put into effect and carry out the plan and the orders of the special court relative thereto and issue the securities provided by the plan without further reference to or authority from the Commission or any other authority, State or Federal, except where required by any law relating to the Reconstruction Finance Corporation, and the rights of all creditors and security holders with respect to claims and securities affected by the plan shall be those provided by the plan as so approved and confirmed: *Provided, however,* That the title of any owner, whether as trustee or otherwise, to rolling-stock equipment leased or conditionally sold to the petitioner, and any right of such owner to take possession of such property in compliance with the provisions of any such lease or conditional sale contract, shall not be affected by the provisions of this chapter.

* * * * *

SEC. 726. After the special court shall have approved as properly filed a petition pursuant to article III hereof, the special court, from time to time during the pendency of the proceedings hereunder, may enjoin the institution of, or stay, for a reasonable time, any action or proceeding to enforce any right against the petitioner or its property based upon claims affected by the proposed plan of adjustment in any court, State or Federal,

whether for the enforcement of any such claim or for the appointment of receivers in equity or of the institution or prosecution of a proceeding under section 77 of the Bankruptcy Act or otherwise: *Provided, however,* That no such stay shall affect any proceeding based on or to enforce any claim which would be required to be paid if the plan of adjustment proposed by the petitioner were then in effect.

* * * * *

SEC. 736. In addition to the notices elsewhere expressly provided, the clerk of the court in which any proceedings under this chapter are pending shall forthwith transmit to the Secretary of the Treasury copies of—

(1) every petition filed under this chapter;

(2) the orders approving or dismissing petitions;

(3) the orders approving plans as filed or as modified, together with copies of such plans as approved;

(4) the decrees approving and confirming plans and the adjustments provided thereby, together with copies of such plans as approved;

(5) the injunctions or other orders made under section 726 of this chapter;

(6) the orders dismissing proceedings under this chapter; and

(7) such other papers filed in the proceedings as the Secretary of the Treasury may request or which the court may direct to be transmitted to him.

SEC. 737. Any order fixing the time for confirming a plan which affects claims or stock of the United States shall include a notice of not less than thirty days to the Secretary of the Treasury.

SEC. 738. The special court shall have power to determine the amount and legality of claims of the United States for taxes or customs duties, and to order payment thereof; and the order of the special court (provided for in section 714) approving the petition shall have the effect of an adjudication of bankruptcy of the petitioner for the purposes of section 274 of the Internal Revenue Code and the corresponding provisions of prior and subsequent revenue Acts. The running of the statute of limitations on the assessment or collection of any internal-revenue tax shall be suspended while a proceeding under this chapter is pending and until it is finally dismissed.

* * * * *

SEC. 745. Any final order or decree of the special court may be reviewed by the Supreme Court of the United States upon application for certiorari made by any person affected by the plan who deems himself aggrieved within sixty days after the entry of such order or decree, pursuant to the applicable provisions of the Judicial Code.

SEC. 746. In the decree approving and confirming the plan the court may require such reports of the action taken by the petitioner thereunder in the execution of the plan as may be necessary to a final disposition of the cause,

and in its final decree disposing of the cause the court shall retain jurisdiction in the district court to the extent necessary to protect and enforce the rights of the parties under said plan and the orders of the court thereon.

* * * * *

SEC. 755. The jurisdiction conferred upon any court by this chapter shall not be exercised by such court after November 1, 1945, except in respect of any proceeding initiated by filing a petition under section 710 hereof on or before November 1, 1945.

Internal Revenue Code:

SEC. 53. TIME AND PLACE FOR FILING RETURNS.

(a) *Time for Filing.*—

(1) *General Rule.*—Returns made on the basis of the calendar year shall be made on or before the 15th day of March following the close of the calendar year. Returns made on the basis of a fiscal year shall be made on or before the 15th day of the third month following the close of the fiscal year.

* * * * *

(26 U. S .C. 1946 ed., Sec. 53.)

SEC. 56. PAYMENT OF TAX.

(a) *Time of Payment.*—The total amount of tax imposed by this chapter shall be paid on the fifteenth day of March following the close of the calendar year, or, if the return

should be made on the basis of a fiscal year, then on the fifteenth day of the third month following the close of the fiscal year.

(b) *Installment Payments.*—The taxpayer may elect to pay the tax in four equal installments, in which case the first installment shall be paid on the date prescribed for the payment of the tax by the taxpayer, the second installment shall be paid on the fifteenth day of the third month, the third installment on the fifteenth day of the sixth month, and the fourth installment on the fifteenth day of the ninth month, after such date. If any installment is not paid on or before the date fixed for its payment, the whole amount of the tax unpaid shall be paid upon notice and demand from the collector.

* * * * *

(26 U. S. C. 1946 ed., Sec. 56.)

SEC. 271. DEFINITION OF DEFICIENCY.

As used in this chapter in respect of a tax imposed by this chapter "deficiency" means—

(a) The amount by which the tax imposed by this chapter exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax; or

(b) If no amount is shown as the tax by the taxpayer upon his return, or if no return is

made by the taxpayer, then the amount by which the tax exceeds the amounts previously assessed (or collected without assessment) as a deficiency; but such amounts previously assessed, or collected without assessment, shall first be decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax.

(26 U. S. C. 1940 ed., Sec. 271.)

SEC. 272. PROCEDURE IN GENERAL.

(a) (1) [As amended by Section 168 (a), Revenue Act of 1942, c. 619, 56 Stat. 798] *Petition to Board of Tax Appeals.*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3653 (a) the making of such assessment or the beginning of such proceed-

ing or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. In the case of a joint return filed by husband and wife such notice of deficiency may be a single joint notice, except that if the Commissioner has been notified by either spouse that separate residences have been established, then, in lieu of the single joint notice, duplicate originals of the joint notice must be sent by registered mail to each spouse at his last known address. If the notice is addressed to a person outside the States of the Union and the District of Columbia, the period specified in this paragraph shall be one hundred and fifty days in lieu of ninety days.

* * * * *

(c) *Failure to File Petition.*—If the taxpayer does not file a petition with the Board within the time prescribed in subsection (a) of this section, the deficiency, notice of which has been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the collector.

* * * * *

(26 U. S. C. 1946 ed., Sec. 272.)

SEC. 274. BANKRUPTCY AND RECEIVERSHIPS.

(a) *Immediate Assessment.*—Upon the adjudication of bankruptcy of any taxpayer in any bankruptcy proceeding or the appointment of a receiver for any taxpayer in any receivership proceeding before any court of the United States or of any State or Territory

or of the District of Columbia, any deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) determined by the Commissioner in respect of a tax imposed by this chapter upon such taxpayer shall, despite the restrictions imposed by section 272 (a) upon assessments be immediately assessed if such deficiency has not theretofore been assessed in accordance with law. In such cases the trustee in bankruptcy or receiver shall give notice in writing to the Commissioner of the adjudication of bankruptcy or the appointment of the receiver, and the running of the statute of limitations on the making of assessments shall be suspended for the period from the date of adjudication in bankruptcy or the appointment of the receiver to a date 30 days after the date upon which the notice from the trustee or receiver is received by the Commissioner; but the suspension under this sentence shall in no case be for a period in excess of two years. Claims for the deficiency and such interest, additional amounts and additions to the tax may be presented, for adjudication in accordance with law, to the court before which the bankruptcy or receivership proceeding is pending, despite the pendency of proceedings for the redetermination of the deficiency in pursuance of a petition to the Board; but no petition for any such redetermination shall be filed with the Board after the adjudication of bankruptcy or the appointment of the receiver.

* * * * *

(26 U. S. C. 1946 ed., Sec. 274.)

SEC. 275. PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

Except as provided in section 276—

(a) *General Rule.*—The amount of income taxes imposed by this chapter shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

* * * * *

(26 U. S. C. 1946 ed., Sec. 275.)

SEC. 729 [As added by Section 201, Second Revenue Act of 1940, c. 757, 54 Stat. 974]. LAWS APPLICABLE.

(a) *General Rule.*—All provisions of law (including penalties) applicable in respect of the taxes imposed by Chapter 1, shall, insofar as not inconsistent with this subchapter, be applicable in respect of the tax imposed by this subchapter.

* * * * *

(26 U. S. C. 1946 ed., Sec. 729.)

28 U. S. C.:

§ 2201. *Creation of remedy*

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be

sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Federal Rules of Civil Procedure:

Rule 60. Relief from Judgment or Order.

(a) CLERICAL MISTAKES. Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

(b) MISTAKE; INADVERTENCE; SURPRISE; EXCUSABLE NEGLECT. On motion the court, upon such terms as are just, may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding, or (2) to set aside within one year, as provided in Section 57 of the Judicial Code, U. S. C., Title 28, § 118, a judgment obtained against a defendant not actually personally notified.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1949 843711 714

FILE COPY

Office - Supreme Court, U.
FILED
SEP 22 1949
CHARLES ELMORE CROP
CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 149

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

THE COLORADO AND SOUTHERN RAILWAY COMPANY.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

J. C. JAMES,
WALTER MCFARLAND,
JOHN L. RICE,
Counsel for Respondent.

THE BYNTHORP-HARTEN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

INDEX.

Subject Matter.

PAGE

Statement 1

Amplification of Petitioner's Statement 3

Summary of Arguments in Opposition to Granting the Writ 5

I. This Proceeding Rests On a Special Statute Which Does Not Authorize This Court to Grant Certiorari, Since (a) Reviews Are Limited to Persons Affected by the Plan, and (b) the United States is Not Affected by the Plan, Within the Express Terms of the Statute 6

II. Review is Not of Public Importance. It Will Not Furnish a Guide for Administration of Any Tax Statute 11

III. Review is Not Needed to Settle, for the Guidance of the Commissioner, the Meaning of Section 53 and Others of the Internal Revenue Code. The Special Court Acted Under the McLaughlin Act, and Did Not Undertake to Interpret the Code 15

IV. The Special Court Made No Departure From the Established Rule of *Res Judicata*. Review is Not Required to Keep That Rule Straight 25

CITATIONS.

Cases.

Ackert v. Baltimore & Ohio Railroad Co. (C. C. A. 4), 115 F. 2d 455, certiorari denied 311 U. S. 717 ... 10

American Service Company v. Henderson (C. C. A. 4), 120 F. 2d 525, 532 ..... 19, 30

Anderson, In re (C. C. A. 2), 279 Fed. 525, 529 23

Barry v. Mercein, 5 Howard 103, 119 8

Bates v. Archer (C. C. A. 6), 288 Fed. 182, 184 23

Black v. Richfield Oil Corporation (C. C. A. 9), 146 F. 2d 801, 805 ..... 30, 32

Brown v. United States, 171 U. S. 631, 637 9

Carey v. Donohue, 240 U. S. 430, 437 ..... 8, 21

Carey v. Houston & T. C. Railway Co., 161 U. S. 115, 128 9

Chapman v. United States, 164 U. S. 436, 446 9

Chicot County Drainage District v. Baxter State Bank, 103 F. 2d 847, 848 ..... 26, 29

Chicot County Drainage District v. Baxter State Bank, 308 U. S. 371, 378 ..... 26, 29, 31

Clarke v. Bazdone, 1 Cranch 212, 213 8

Colorado & Southern R. Co., In re (D. C. Col.), 84 F. Supp. 134 3

Colorado C. C. Mining Co. v. Turck, 150 U. S. 138, 141. 8

Commissioner of Internal Revenue v. Sunnen, 333 U. S. 591 31

Daniels v. Chicago & Rock Island Railroad Co., 3 Wall. 250, 254 8

DeAngeles, In re (C. C. A. 10), 36 F. 2d 218, 219 23

District of Columbia v. Sweeney, 310 U. S. 631 12

El Banco Popular de Economias y Prestamos v. Wilcox, 255 U. S. 72, 76 9

Elgin v. Marshall, 106 U. S. 578, 580..... 9

Farnsworth v. Montana, 129 U. S. 104, 113-114 9

Fox v. Standard Oil Company of New Jersey, 294 U. S. 87, 96 .....8, 21

Francis Wright, The, 105 U. S. 381, 385 9

Gardner v. New Jersey, 329 U. S. 565, 573 .....22, 23

General Film Corporation, In re (C. C. A. 2), 274 Fed. 903, 904 23

Georgia v. Pennsylvania Railroad Co., 324 U. S. 439, 457 .....8, 21

Great Lakes D. & D. Co. v. Huffman, 319 U. S. 293, 295 26

Gregory v. Van Ee, 160 U. S. 643, 645..... 9

Harvard State Bank v. Baltimore & Ohio Railroad Co., 311 U. S. 717 10

Heath, In re, 144 U. S. 92, 96 9

Inter-Island Steamship and Navigation Co. v. Ward, 242 U. S. 1, 3 9

Last Chance Mining Co. v. Tyler Mining Co., 157 U. S. 683, 694-5 29

Laurel Oil & Gas Company v. Morrison, 212 U. S. 291, 296 9

Layne and Bowler Corporation v. Western Well Works, 261 U. S. 387, 393 14

Leadville Coal Co. v. McCreery, 141 U. S. 475, 478 ... 29

Lehigh Valley R. Co., In re (D. C. Pa.), 34 F. Supp. 750, 752 19

Local Loan Co. v. Hunt, 292 U. S. 234, 239..... 26

Luckenbach Steamship Co. v. United States, 272 U. S. 533, 536 10
Magnum Import Co. v. Coty, 262 U. S. 159, 163 14
Massachusetts v. Meehan (C. C. A. 7), 67 F. 2d 638, 640 23
Maynard v. Hecht, 151 U. S. 324, 328 9
McCardle, Ex Parte, 7 Wall. 506, 513..... 8
McCarl v. Halstead (C. C. A. D. C.), 45 F. 2d 665, 666-7 23
Merrill v. Petty, 16 Wall. 338, 345-6 8
Meyer v. Kenmore Granville Hotel Co., 297 U. S. 160, 165-6 9
Morgenstern & Company, In re (C. C. A. 2), 57 F. 2d 163-4 23
Murdock v. Mayor of Memphis, 20 Wall. 590, 620 8
National Exchange Bank v. Peters, 144 U. S. 570, 572 . 8
New Jersey v. Anderson, 203 U. S. 483, 494 22
New York v. Irving Trust Company, 288 U. S. 329, 333 23
New York v. Jersawit, 263 U. S. 493, 496 22
Norris v. Camp, 144 F. 2d 1, 4 .....24, 30
Parish v. Ellis, 16 Peters 451, 453 8
Pope v. Louisville N. A. & C. Railway Co., 173 U. S. 573, 577 9
Rouse v. Letcher, 156 U. S. 47, 50 9
Snow v. United States, 118 U. S. 346, 354 9
Stavin, In re (D. C. N. Y.), 12 F. 2d 471, 473-4 23
St. Louis, Iron Mountain & Southern Railway Co. v. Taylor, 210 U. S. 281, 292 9

Tiller v. Atlantic Coast Line Railroad Co., 318 U. S. 54, 66 ..... 8, 21
United States v. Eyges (D. C. Mass.), 286 Fed. 683, 684 23
United States v. Rice, 327 U. S. 742, 749 10
United States v. Sanges, 144 U. S. 310, 319 9
Vallandingham, Ex Parte, 1 Wall. 243, 249-50 8
Walker v. United States, 4 Wall. 163, 165 8

Statutes.

Bankruptcy Act of 1898, c. 541, 30 Stat. S544, as amended (11 U. S. C. 1, et seq.)
Chapter VIII (Section 77) 12, 22
Chapter X (11 U. S. C. Sections 501-676) 13
Section 569 13
Section 596 13
Section 671 13
Chapter XI (11 U. S. C. Sections 701-799) 13
Section 731 13
Section 732 13
Section 733 13
Section 734 13
Section 743 13
Section 744 13
Section 761 13
Section 762 13
Section 797 13
Chapter XII (11 U. S. C. Sections 801-926) 13
Section 806 13
Sections 832-837 13
Section 845 13
Section 846 13
Sections 861-872 13

Chapter XV (as added by the Act of October 16, 1942, c. 610, 56 Stat. 787) 1, 6, 9, 11
Section 705 ..... 6, 22
Section 706 6
Section 710 12
Section 720 ..... 12, 19
Section 722 ..... 6, 18, 22, 25, 26, 28
Section 725(7) 25
Section 727 12
Section 736 ..... 10, 16, 18, 25, 26
Section 737 ..... 16, 19, 25, 26
Section 738 ..... 2, 19, 23, 26
Section 745 ..... 6, 9
Section 746 27

Chapter XV (53 Stat. 1134, expiring July 31, 1940) 10

Internal Revenue Code
Section 53(a)(1) 18
Section 271 18
Section 274 ..... 2, 19, 23
Section 275(a) 18
Section 279 18
Section 3614(a) 24

Judicial Code
Sections 2201-2 27

Miscellaneous.

Hearings on H. R. 6840 before a Special Subcommittee on Bankruptcy and Reorganization of the House Judiciary Committee, 77th Cong., 2d Session, April 29, 1942, p. 26 ..... 7, 20

Regulations 111 of the Treasury Department, Section 29.274-1 21

Rules of Civil Procedure, Rule 60 ..... 18, 24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 149.

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

THE COLORADO AND SOUTHERN RAILWAY COMPANY.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

The Colorado and Southern Railway Company effected a Plan of Adjustment of its indebtedness under former Chapter XV of the Bankruptcy Act, sometimes called the McLaughlin Act, which was passed for the purpose of helping railroads which were temporarily in financial difficulty, but not in need of complete reorganization, to meet their obligations, thus enabling them better to sustain the unusual demands upon them as a part of the war effort. The Plan was approved by decree of March 8, 1943, of the specially constituted District Court.

Pursuant to the requirements of that Act, the Secretary

of the Treasury was served with copy of the petition for approval of the Plan, and notified of the date for hearing.

The Railway Company alleged that, so far as it had knowledge, the United States was not a creditor on claims for taxes and that no such claims were affected by the Plan. The United States made an investigation before the hearing, filed no claims for taxes and did not plead or appear at the hearing, held on March 3 and 4, 1943.

Section 738 of Chapter XV provided, in part, that the order of the Special Court under Section 714, approving the petition as properly filed, "shall have the effect of an adjudication of bankruptcy of the petitioner for the purposes of section 274 of the Internal Revenue Code * * *." Section 274 provides for immediate assessment of any deficiency determined by the Commissioner in respect of a tax imposed by Chapter I of the Code. The United States asserted no claim of tax deficiency until September 17, 1946, when the Internal Revenue Agent in Charge at Denver notified the Railway Company of proposed additional taxes aggregating $3,001,061.73, plus interest, for 1942 and 1943. Meanwhile, in executing the Plan, the Railway Company had devoted substantially all its earnings to reduction of its debt, including payment of some $19,000,000 to Reconstruction Finance Corporation in principal and interest.

On October 4, 1948, the Railway Company filed a supplemental petition in the original case to bar the United States from claiming additional liability of the Railway Company and its subsidiaries for income taxes for the year 1942 and from claiming other and different bases and methods from those used by the Railway Company and its subsidiaries in their consolidated income and excess profits tax returns for 1940, 1941, and 1942.

The special District Court entered its findings of fact, conclusions of law and judgment on April 29, 1949, *In re*

Colorado & S. R. Co., 84 F. Supp. 134. The Court granted the relief prayed.

The petition for certiorari states that the two questions to be determined are (1) whether the special District Court had jurisdiction to render a judgment as to the Railway Company's liability for additional 1942 and 1943 taxes; and (2), if so, whether the decree of March 8, 1943, is *res judicata* that the Railway Company owes no additional taxes for 1942, and that the data, computations, deductions and carryovers on its returns for 1940, 1941, and 1942 were correct and must be used in computing tax liability for 1943.

Before reaching those questions there are, however, two points to be decided, (1) whether this Court has jurisdiction to issue a writ of certiorari in this case, and (2), if so, whether the case is of such importance as to warrant the issuance of the writ. It is the position of respondent that both questions must be answered in the negative. Congress did not intend to make a review on writ of certiorari available to the United States, and this was admitted by the representative of the Treasury Department while Chapter XV was before Congress. The case is not of general interest as a precedent for the reason that Chapter XV has expired and, in the necessity for expeditious action and otherwise, it differed from other parts of the Bankruptcy Act, relied upon by the United States.

Amplification of Petitioner's Statement.

The statement by petitioner is reasonably accurate and is accepted by the respondent with the following amplifications:

On page 4 of the petition, it is said that the United States made "an investigation before the hearing." This is correct, but there should be added that the investigation

consisted of an inquiry and inspection made by a representative of the Treasury Department at the office of the Company's General Auditor at Denver, early in 1943, before the hearing was had on the Plan. This representative was shown copies of the tax returns for 1940 and 1941, and his attention was called to the large carry-over credits therein available for 1942 and subsequent years. He was informed that because of such carry-overs there would be no 1942 taxes, further that amended returns for 1940 and 1941 would be filed by March 15, 1943, which would greatly increase these carry-over credits, and that such amended carry-overs would be used in the 1942 return. The work sheets for the amended 1940 and 1941 returns likewise were exhibited to him (R. 221).

Also on page 4, it is said by petitioner that the United States "did not appear at the hearing." It should be added that the United States not only failed to appear at the hearing, but filed no pleading or claim and made no appearance in any manner in the case until served with notice of the Supplemental Petition of October 4, 1948.

On page 5, petitioner states that amended income tax returns for 1940 and 1941 were filed by the taxpayer, March 12, 1943. It should be kept in mind that the contents of these amended returns, and the intention to file them, had been brought to the attention of the Government's investigator in the Plan proceeding early in 1943, before the hearing (R. 221).

Attention is called to the fact that the Government has printed only a part of the Record. A large number of exhibits, orders and other documents have been omitted (R. 267-272).

SUMMARY OF ARGUMENTS IN OPPOSITION TO GRANTING THE WRIT.

1. The Supreme Court has no appellate jurisdiction, except such as is conferred by Acts of Congress.

2. The McLaughlin Act limits review to a certain class of parties.

3. No party to a proceeding under that Act may have review unless he is "affected by the Plan."

4. The petitioner here may not have review:

(a) Because under the terms of the statute, the United States, while a creditor, is not a creditor who holds an evidence of his debt or an instrument defining his rights which are modified by the Plan.

(b) Because the Special Court in its original decree held correctly under the facts and the law that the United States was not a creditor on any claim affected by the Plan.

5. Review of this case is not important to the public:

(a) The statute involved has expired.

(b) A decision in this case will not be instructive to the Commissioner in administering other tax statutes, all of which are dissimilar.

6. Review will not settle for the guidance of the Commissioner any provision of the Revenue Code:

(a) Since this action was decided solely upon the provisions of the McLaughlin Act.

(b) Since no provision of the Revenue Code is similar in text or import to the McLaughlin Act.

7. Established rules applicable to former adjudication were not departed from by the Special Court:

(a) Because the case was decided principally upon the basis that any other decision would interfere with the execution of the Plan theretofore adopted.

(b) Because the original decree and the decree in question involved the same cause of action, and there had been no intervening change of law.

ARGUMENT.

I.

This Proceeding Rests On a Special Statute Which Does Not Authorize This Court to Grant Certiorari, Since (a) Reviews Are Limited to Persons Affected By the Plan, and (b) the United States Is Not Affected By the Plan, Within the Express Terms of the Statute.

Former Chapter XV of the Bankruptcy Act (56 Stat. 787) sometimes referred to as the McLaughlin Act, defines "Creditors" as including "all holders of claims, demands, and obligations of whatever character against the petitioner or its property, whether or not such claims would otherwise constitute provable claims in bankruptcy * * *" (§ 705); provides that a creditor shall not be deemed "affected" by any plan unless it modifies his evidence of debt, or the instrument defining his rights, or his security (§ 706); and limits the right to apply to the Supreme Court for certiorari to those "affected by the plan" (§ 745). As to taxes, the United States is classified as a creditor (§ 722).

The Government is not affected by the Plan because with respect to taxes it holds no evidence of the debt, instrument defining its rights, or a security. The Colorado and Southern Plan could not and did not propose a modification of anything regarding taxes (R. 80-95).

The United States always has known that Chapter XV vested it with no right to ask review, on a tax claim, because not affected by plans established thereunder. When the bill (H. R. 6840) was before Congress, Mr. Stanley Surrey, Assistant Tax Legislative Counsel of the Treasury Department, appeared before the Special Subcommittee on Bankruptcy and Reorganization of the House Judiciary

Committee and sought amendments which would declare the Government to be "affected" by such plan, and thus enable it to apply for certiorari. He stated to the Committee (Hearings on H. R. 6840, 77th Congress, 2d Session, April 29, 1942, page 26):

> "It is also suggested that section 722 of the bill be changed so that, like section 199 of the Bankruptcy Act, as amended, it will provide that where the United States or any agency thereof or a Federal corporation is a creditor or stockholder, such claims or stock shall be deemed to be affected by the plan.
>
> "Under section 705, subdivision 4 of the bill, the United States is a creditor, and, as such, is permitted to file claims in the proceedings. The court, under section 738 of the bill is empowered to determine the amount and legality of claims of the United States for taxes and customs duties. It should be noted that under section 745 of the bill, only those persons 'affected by the plan' may apply for certiorari to the Supreme Court of the United States from any final order or decree entered by the special court, and that by virtue of section 706 of the bill, the United States, although a creditor, would not be deemed to be affected by any plan unless a modification of the evidence of debt or other instrument defining the rights of creditors is proposed by the plan. *It is not believed that tax claims or customs duties of the United States fall within the meaning of section 706 because they are not based upon any evidences of debt or other instruments defining the rights of creditors. By reason of these provisions it would seem that the United States would be deprived of an appellate forum for the determination of tax claims or customs duties,* unless section 722 of the bill is amended to provide that 'the claims or stock' of the United States are deemed to be affected by a plan under this chapter. * * *." (Emphasis supplied.)

And, as appears from the same source, page 27, Mr. Surrey later wrote Hon. Charles F. McLaughlin, Chairman of the Subcommittee, proposing that Section 722 be amended to

provide that claims held by the United States "shall be deemed to be affected by a plan under this chapter * * *."

These amendments proposed by the Treasury Department, however, were not adopted. As passed, Chapter XV provides that only those affected by the plan may seek review (§ 745); and that only those whose evidence of debt or instrument defining rights or security is thereby modified, are to be deemed "affected" by the plan (§ 706). Rejection of the proposed amendments makes plain that Congress did not intend that the Government should have the right to apply for review from the decision of the three-judge Court with respect to taxes. *Fox* v. *Standard Oil Co. of New Jersey*, 294 U. S. 87, 96; *Tiller* v. *Atlantic Coast Line R. R. Co.*, 318 U. S. 54, 66; *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 457, and *Carey* v. *Donohue*, 240 U. S. 430, 437.

From the beginning the Supreme Court has held that, under Section 2 of Article III of the Constitution, this court's appellate authority is not to be assumed or implied, but must be expressed in a statute. In *Colorado C. C. Mining Co.* v. *Turck*, 150 U. S. 138, 141, it was said:

> "From *Wiscart* v. *Dauchy*, 3 U. S. 3 Dall. 321, to *American Constr. Co.* v. *Jacksonville T. & K. W. R. Co.*, 148 U. S. 372, it has been held in an uninterrupted series of decisions that this court exercises appellate jurisdiction only in accordance with the acts of Congress upon that subject."

The rule was applied in the following decisions: *Clarke* v. *Bazadone*, 1 Cranch. 212, 213; *Durousseau* v. *United States*, 6 Cranch. 307, 313-4; *Parish* v. *Ellis*, 16 Peters 451, 453; *Barry* v. *Mercein*, 5 How. 103, 119; *Ex Parte Vallandigham*, 1 Wall. 243, 249-50; *Daniels* v. *Chicago & Rock Island R. R. Co.*, 3 Wall. 250, 254; *Walker* v. *United States*, 4 Wall. 163, 165; *Ex Parte McCardle*, 7 Wall. 506, 513; *Merrill* v. *Petty*, 16 Wall. 338, 345-6; *Murdock* v. *Mayor of Memphis*,

20 Wall. 590, 620; *The Francis Wright,* 105 U. S. 381, 385; *Elgin* v. *Marshall,* 106 U. S. 578, 580; *Snow* v. *United States,* 118 U. S. 346, 354; *Farnsworth* v. *Montana,* 129 U. S. 104, 113-4; *In re Heath,* 144 U. S. 92, 96; *United States* v. *Sanges,* 144 U. S. 310, 319; *National Exchange Bank* v. *Peters,* 144 U. S. 570, 572; *Cross* v. *United States,* 145 U. S. 571, 574; *Maynard* v. *Hecht,* 151 U. S. 324, 328; *Chapman* v. *United States,* 164 U. S. 436, 446; *Brown* v. *United States,* 171 U. S. 631, 637; *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Taylor,* 210 U. S. 281, 292; *Laurel Oil & Gas Company* v. *Morrison,* 212 U. S. 291, 296; *El Banco Popular de Economias y Prestamos* v. *Wilcox,* 255 U. S. 72, 76.

The principle that an appeal may be taken only in accordance with statutory authorization was given effect in the 77B reorganization case in bankruptcy of *Meyer* v. *Kenmore Granville Hotel Co.,* 297 U. S. 160, 165-6.

Former Chapter XV of the Bankruptcy Act was a special Act, passed to accomplish financial adjustments for Railroads. The provisions relating to review in a special law may not be disregarded and general provisions substituted, *Inter-Island Steam N. Co.* v. *Ward,* 242 U. S. 1, 3.

Clearly, the United States would have had no right to apply for certiorari under Section 745 of the McLaughlin Act with respect to the original decree of March 8, 1943 approving the Plan, because the Government was wholly unaffected by the Plan within the meaning of the McLaughlin Act. It has no greater right in the present proceeding, because this case is ancillary and subordinate to the original case (R. 258). This Court holds that it has no appellate jurisdiction over an ancillary or auxiliary proceeding, if it had none in the main case. *Rouse* v. *Letcher,* 156 U. S. 47, 50; *Gregory* v. *Van Ee,* 160 U. S. 643, 645; *Carey* v. *Houston & T. C. Ry. Co.,* 161 U. S. 115, 128; *Pope* v. *Louisville N. A. & C. Ry. Co.,* 173 U. S. 573, 577.

An appellate review is not essential to due process of law; at most it is a matter of grace, *Luckenbach Steamship Co.* v. *United States,* 272 U. S. 533, 536.

A prior Chapter XV (the Chandler Act) of the bankruptcy statutes, expiring July 31, 1940 (53 Stat. 1134) was substantially the same in purpose and content as the later McLaughlin Act, including Section 745, relating to review. In proceedings under the Chandler Act approving a Plan for the Baltimore and Ohio, persons not affected by the plan made claims which were denied by the three-judge Court. In an attempted appeal to the Circuit Court of Appeals that Court said in *Ackert* v. *Baltimore & O. R. Co.* (C. C. A. 4), 115 F. 2d 455, 458-9, with respect to right of review (emphasis supplied):

> "The appellants in cases Nos. 4716 and 4717 complain that this construction of the act leaves them without any opportunity of review whatsoever, because § 745 is limited to an application for a writ of certiorari by *'any person affected by the plan who deems himself aggrieved';* and, it is said, this language does not cover a person aggrieved by the denial of counsel fees that form no part of the plan. Assuming that this narrow construction of the section is correct, it does not follow that an appeal lies to the Circuit Court of Appeals. While an appeal from the decree of a District Court is a customary statutory procedure, *it exists only by grace of the statute and not otherwise. The mere fact that the interests of a person are adversely affected by a decree of court does not give him a right of appeal. Bradford* v. *Southern R. Co.,* 195 U. S. 243, 250, 25 S. Ct. 55, 49 L. Ed. 178; *In re Philadelphia & Reading Coal & Iron Co.,* 3 Cir., 103 F. 2d 901; *Burns* v. *Ender Coal & Coke Co.,* 7 Cir., 104 F. 2d 964; *In re Haytian Corp. of America,* 2 Cir., 112 F. 2d 146, 147. • • •
>
> *"We conclude that Congress provided in Chapter XV of the Bankruptcy Act a new and special procedure, complete in itself, and limited to a particular class of cases; and that the only permissible review of a decree*

or order of a three-judge court convened thereunder is that conferred upon the Supreme Court in its discretion to grant a writ of certiorari to any person affected by the plan who deems himself aggrieved thereby."

This Court denied certiorari, *Harvard State Bank* v. *Baltimore & O. R. Co.*, 311 U. S. 717.

In *United States* v. *Rice*, 327 U. S. 742, 749, this Court made the following pertinent announcement:

> "* * * To whatever extent the Government may be excluded from the operation of a statute in which it is not named, cf. *United States* v. *Stevenson*, 215 U. S. 190, 197, 54 L. Ed. 153, 156, 30 S. Ct. 35, with *United States* v. *California*, 297 U. S. 175, 186, 80 L. Ed. 567, 573, 56 S. Ct. 421, it is clear that the United States can not assert, by virtue of its sovereignty, a right of appeal which no statute has conferred, or which, if conferred, has been abolished."

The Court will also note that in the original decree of March 8, 1943 (R. 97) the special court held specifically that the United States had no "claim affected by the plan". Being unaffected by the Plan, within the meaning of the McLaughlin Act, the United States is not in position to ask certiorari, and the Court is without jurisdiction to grant it.

II.

Review Is Not of Public Importance. It Will Not Furnish a Guide for Administration of Any Tax Statute.

The Solicitor General first affirms (Pet. 9) and then negates (Pet. 10) the proposition that the Court should pass on the case for the guidance of the Commissioner of Internal Revenue in the administration of Chapter XV of the Bankruptcy Act. Such guide is neither needed nor usable. Chapter XV expired November 1, 1945, and no

further Plans of Adjustment may be established thereunder (§ 755, 56 Stat. 795, Pet. 32). In *District of Columbia* v. *Sweeney*, 310 U. S. 631, with respect to certiorari, the Court held: "Denied in view of the fact that the tax is laid under a statute which has been repealed and the question is therefore not of public importance."

Neither will a decision be a source of instruction to the Commissioner in administering the other tax statutes in bankruptcy, referred to in the petition. The McLaughlin Act (Ch. XV) required that the Plan be formulated, approved by the Interstate Commerce Commission and assented to by a designated number of creditors before filing in the District Court for consideration by three judges (§ 710); that notice then be given "forthwith" to the Secretary of the Treasury (§ 736) and reasonably soon "to all persons in interest" (§ 720); and that the hearing on the plan be held "promptly" (§ 720). A plan not approved within a year is to be dismissed (§ 727). Expedition is of the essence of the proceeding. If the Government was to have its tax claims recognized, it was obliged to bring them in before the plan was confirmed, whether the tax return day of March 15 had arrived or not; otherwise a plan under Chapter XV could not have been established with the speed that the statute prescribed. Unlike the McLaughlin Act, Section 77 (11 U. S. C. A. 205) for railroad reorganization proceeds more leisurely. The plan need not be proposed until six months after the petition is filed. The same is to be heard by the Commission thereafter (d), and still later by a court of one judge (e). Time is given for filing claims, which may be extended (c) (7). As all know, a number of years intervene before a plan is finally approved, and taxes need not be dealt with until final approval of the belated plan (e). The necessity for filing an income tax claim before March 15 for the last preceding year never arises in a Section 77 case.

Chapter X for corporate reorganization (11 U. S. C. A. §§ 501-676) presents the same situation. Plans are not formulated until after the petition is filed, and then within a subsequent time fixed by the Court, with hearing still later (§ 569). Time is allowed for claims (§ 596) and special provision is made for subsequent payment of all taxes, found owing within one year after the petition is filed but not assessed before confirmation of the plan, by the reorganized or successor corporation (§ 671).

Chapter XI authorizing "Arrangements" for unsecured debts (11 U. S. C. A. §§ 701-799) provides for an extensive proceeding to arrive at an Arrangement, with referee (§ 731), receiver or trustee (§ 732) appraisers (§ 733) creditors' meeting (§ 734) management of debtor's business by receiver (§ 743) issuance of certificate of indebtedness for purposes of the business (§ 744) and ultimate confirmation of the Arrangement (§§ 761, 762). Taxes found owing within a year after petition and not assessed before confirmation of the Arrangement must be paid afterwards by the debtor or by the corporation made use of to effectuate the Arrangement (§ 797).

Chapter XII (11 U. S. C. A. §§ 801-926) is much the same as XI. It relates to Arrangements with respect to debts secured by real property (§ 806); provides for referee, trustee, appraisers, creditors' meeting, continuation of business (§ 832-837, 845) certificates of indebtedness (§ 846) and consideration and confirmation of the Arrangement by creditors and Court (§§ 861-872). Like Chapters X and XI, Chapter XII provides that taxes, found owing within one year after the petition but not assessed before confirmation, shall be paid by the debtor or successor corporation.

Under none of the bankruptcy statutes referred to by the Government is it likely that the present question could arise, viz., must the United States file its tax claims and

contentions for the preceding year before March 15, in order that such claims and contentions may be considered in the formation of the plan? None of them required the expedition provided for by the McLaughlin Act. It alone contains a time limit for approval of the plan. The prime purpose of Chapter XV was by speedy action to save an embarrassed railroad from financial collapse, especially in meeting the demands of the war; whereas the other bankruptcy chapters referred to were enacted to provide a means of fairly dividing the debtor's assets, by reorganization, among creditors. It will be time enough to furnish the Commissioner a guide for the administration of these other chapters, now all of long standing, when questions arise thereunder.

In *Magnum Import Co.* v. *Coty*, 262 U. S. 159, 163, the Court held:

> "* * * The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given for two purposes: first, to secure uniformity of decision between those courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing."

And in *Layne & Bowler Corporation* v. *Western Well Works*, 261 U. S. 387, 393:

> "* * * If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing con-

flict of opinion and authority between the circuit courts of appeal."

In his address before the American Law Institute, May 10, 1934, the then Chief Justice Hughes stated the rule thus (20 Am. Bar Ass'n. Jour. 341):

> "It is not the importance of the parties or the amount involved that is controlling, but the need of securing harmony of decision and the appropriate settlement of questions of general importance so that the system of federal justice may be appropriately administered. * * *"

III.

Review Is Not Needed to Settle, for the Guidance of the Commissioner, the Meaning of Section 53 and Others of the Internal Revenue Code. The Special Court Acted Under the McLaughlin Act, and Did Not Undertake to Interpret the Code.

The Colorado and Southern, in financial distress, filed its proposed Plan of Adjustment under the McLaughlin Act with petition for approval in the District Court November 9, 1942. Notwithstanding the facts that the war was then in progress and increased railroad traffic was being enjoyed, the Plan proposed elimination of all dividends to stockholders, reduction of interest rates, payment of interest in part only if earned, limitation of capital expenditures from current earnings to $300,000 a year, and the application of all other income to reduction of debt, for a period of thirteen years (R. 80-95). Because of its large invested capital and extensive excess-profits credits and losses to be carried over from depression years, and relying on methods and bases employed and returned in past tax returns for computation of depreciation and retirements, the Company foresaw no war taxes beyond those to be computed by using such methods and bases. It there-

fore made no provision in the Plan for additional taxes, stating in the petition that the Government was not a creditor for taxes (R. 10).

In accordance with the McLaughlin Act (§§ 736, 737) the Clerk of the Court on the day of filing served the Plan and petition on the Secretary of the Treasury, notified him December 15, 1942, that hearing would be had February 23, 1943, and again on January 26, 1943, that the hearing had been postponed to March 3, 1943 (R. 74, 124). Notwithstanding the foregoing, the United States made no appearance at the hearing, held March 3 and 4, 1943, and neither made claim for taxes nor gave notice that it would subsequently undertake to change the Company's tax returns for 1940, 1941 or 1942, whereby taxes would be greatly increased during plan-years. On the contrary, it stood by and permitted the Plan to be heard and approved, without a tax provision in its behalf. On this record and the evidence the Court found that the Government was not a creditor of the Railway for taxes, and approved the Plan without tax provisions (R. 80-95).

Thereafter, in execution of and reliance on the Plan, the Railway and subsidiaries paid the Government's Reconstruction Finance Corporation approximately $11,000,000 principal in reduction of indebtedness at full face amount, with $8,166,672 in interest; utilized $4,268,000 in purchases of its General Mortgage Bonds at an average price of forty cents on the dollar, with $3,212,125 interest to General Mortgage bondholders; and paid $11,891,734 in federal taxes, which, as a result of plan-reduced interest, was $1,556,339 more than would have been paid if the Plan had not been in operation (R. 168).

In 1946, after said payments had been made under the Plan to the depletion of the Company's Treasury and at the sacrifice of dividends and interest by stockholders and bondholders, the United States came forward with a dec-

laration of intention to rewrite the consolidated tax returns for 1940, 1941, 1942 and 1943, and thereby to greatly reduce the equity invested capital, revise depreciation rates back to 1913 in part, eliminate losses and credits subject to carryover from 1940, 1941 and 1942, and thus to increase taxes for 1942 and 1943 by more than $3,000,000 (R. 251, 252). The statutory six per cent interest on such increase, computed to December 31, 1948, would be $960,818 (R. 226). Such exaction would make further execution of the Plan impossible, render futile the sacrifices of dividends and interest made in reliance on continued performance of the Plan (R. 255), and unjustly deprive the Railway Company and its bondholders and stockholders of the benefits of the decree of the Special Court entered March 8, 1943.

Unable to dissuade the Bureau of Internal Revenue from its destructive course, the Railway Company filed a supplemental petition, ancillary to the original case in which the Plan was established, to enforce its rights under the Plan and the decree establishing the same (R. 106-119). April 29, 1949, in the ancillary proceedings, the Special Court of three judges rendered the judgment, review of which is asked, holding that because the United States had made default in 1943 and failed to make claim for income taxes for 1942 or to then propose changes (to be operative under the Plan) of the tax bases and methods previously reported in the 1940 and 1941 returns, it was barred by the decree from so doing (R. 258-264). The gist of the decision is that the United States could not remain silent about 1942 taxes and proposed changes of bases and methods used in earlier returns when the Plan was being established by the Court, and during years of its partial execution to the great benefit of Reconstruction Finance Corporation, and then come forward in the face of the decree with 1942 claims and changes for prior

years, to the destruction of the Plan and injury of those who had acted in reliance thereon.

The Special Court ruled that it was the Government's duty to present its claims for 1942 taxes, and proposed changes in the 1940 and 1941 returns, prior to confirmation of the Plan March 8, 1943, or at most within the six months following, under Rule 60 (R. 247, 260). In opposition the United States now advances the untenable theory that, because sections 53(a)(1), 271, 275(a) and 279 of the Revenue Code contemplate in normal course that the annual process of determining and assessing income taxes starts with the filing of the taxpayer's return, the Government was helpless with respect to 1942 taxes until return was filed March 15, 1943. The error in this is that the Solicitor General (like the Secretary of the Treasury in 1943) disregards the fact that this is a proceeding under Chapter XV, specially enacted to accomplish speedy railroad adjustments in time of distress; and that necessarily its tax requirements are controlling over Revenue Code provisions intended for normal application. Here a Plan of Adjustment was being established under a statute calling for speed. To act upon such plan intelligently, and to make one that would work, it was necessary that the Court have before it all assets and resources of the debtor, on the one hand, and all the claims against it, on the other, so that the resources might be spread and the claims reduced and postponed in order to make the former ultimately take care of the latter. That could not be done if a $3,000,000 tax claim were withheld from the Court.

Congress provided against such miscarriage in the McLaughlin Act by making the Secretary of the Treasury the representative of the United States in all Chapter XV cases with respect to taxes (§ 722), providing that notice and copies be given him forthwith upon institution of a plan case (§ 736) and that he be notified thirty days in

advance of hearing (§ 737), vesting the Special Court with jurisdiction to determine amount and legality of taxes and to order payment (§ 738), making approval of the petition equivalent to adjudication of bankruptcy for purposes of § 274 of the Revenue Code (id.) and enacting that if the United States is a "creditor" for taxes the plan should not be confirmed unless it provides for payment thereof (§ 722). What is this but a direct command to the Treasury Department to appear in every Chapter XV case and present the Government's tax claims in time to be dealt with in the formation of the plan, regardless of the time of year the hearing was had? The very nature of the matter demanded that the Government come in with its taxes in time, or forever keep quiet. If creditors may remain away while a plan is being established, and after decree destroy the plan by then asserting their claims, proceedings under Chapter XV are futile.

In *American Service Co.* v. *Henderson* (C. C. A. 4), 120 F. 2d 525, 532, it was held that a claimant to an escrow fund was barred because he had not presented his claim to the fund while the escrow holder was undergoing Section 77B reorganization. On the necessity of presenting all claims while the plan is being considered, the Court said:

> "The very kernel of a reorganization proceeding is the careful consideration given to all outstanding liabilities, debts, and claims. Only in the light of such an examination does it become possible for the bankruptcy court to determine whether the corporation as recapitalized can weather the financial storm. Cf. Caplin, Valuation and Earnings in Railroad Reorganization (1941), 27 Va. L. Rev. 769, 789. For such an examination and such a determination to be successful, every obligation of the debtor must be brought before the eye of the court."

In re Lehigh Valley R. Co. (D. C. Pa.), 34 Fed. Supp. 750, 752, relied on by the Government, was a case under

Chapter XV of the Bankruptcy Act, as first enacted (53 Stat. 1134). On this point, with respect to an asset of some $3,500,000 the Court said:

> "Before we finally approve and confirm the plan of adjustment filed in this case, Clause (3) of Section 725 of the Bankruptcy Act requires that we must find that the plan is fair and equitable as an adjustment and affords due recognition to the rights of each class of creditors and stockholders. In considering these questions it is obvious that the court will have to take into consideration so important an asset as the net amount to be recovered in the Black Tom Explosion case."

For like reason it was imperative that the Special Court have before it and take into consideration the Government's $3,001,061.73 tax claim in this case before acting on the Plan, if that claim was subsequently to be recognized. The Secretary of the Treasury was bound to observe the requirements of the McLaughlin Act and submit his claims while formation of the Plan was still before the Court, if a successful plan was to be made. He was not at liberty to rest his inactivity on general provisions of the Revenue Code which in normal situations allowed him to wait until March 15 to go to work.

The Treasury Department always has understood that under the McLaughlin Act tax claims must be presented before confirmation of the Plan. When the Act was before Congress, Mr. Surrey of that Department in his appearance in April, 1942, previously mentioned, before the Special Subcommittee stated (Hearings on H. R. 6840, 77th Congress, 2d Session, April 29, 1942, page 26, emphasis supplied):

> "In view of the *binding effect* of a plan confirmed under Chapter XV, it is suggested that a provision be inserted similar to Section 271 of the Bankruptcy Act, as amended, *in order to take care of taxes undetermined, or unassessed at the date of confirmation of the Plan.* This is a saving provision in the interest of

Federal and state income taxing agencies. It is intended to keep open for one year after the date of the filing of the petition, tax claims where the debtor did not file a tax return and such return should have been filed before the date of his petition, *or where the time for filing the tax return had not expired on the date of the petition, or where the taxable year had not expired on the date of the petition.*"

Mr. Surrey submitted to the Committee a new section to keep tax claims open a year; but that recommendation of the Treasury Department was not adopted by Congress. Omission of this provision urged by Mr. Surrey indicates that Congress intended that all claims for taxes should be filed before confirmation of the Plan. *Carey* v. *Donohue,* 240 U. S. 430, 437; *Fox* v. *Standard Oil Company of New Jersey,* 294 U. S. 87, 96; *Tiller* v. *Atlantic Coast Line R. R. Co.,* 318 U. S. 54, 66; and *Georgia* v. *Pennsylvania R. Co.,* 324 U. S. 439, 457.

The Regulations themselves of the Treasury Department made plain its duty to bring in its tax claims before the Plan was confirmed. Section 29.274-1 of Regulations 111 is, in part, as follows (Please notice the reference to Chapter XV):

"As used in these regulations the term 'bankruptcy proceeding' includes proceedings under Chapters I to VII of the Bankruptcy Act, as amended, or under section 74, 75, 77, or 77B, or Chapters X to XIII, or Chapter XV, of such Act, as amended; and the term 'adjudication in a proceeding under Chapters I to VII, the approval of a petition as properly filed under section 77 or 77B or Chapter X by a court of competent jurisdiction or the filing of a petition under section 74 or 75 or Chapters XI to XIII or Chapter XV with a court of competent jurisdiction.

• • •

"Collectors should, promptly after notice of outstanding liability against a taxpayer in any bankruptcy or receivership proceeding, and in any event within

> the time limited by the appropriate provisions of the Bankruptcy Act, as amended, and the orders of the court in which such proceeding is pending, file claim covering such liability in the court in which such proceeding is pending. *Such claim should be filed whether the unpaid taxes involved have been assessed or not,* except in cases where the departmental instructions direct otherwise; * * *" (Emphasis supplied.)

The Petitioner seeks to excuse prompt filing of its tax claims on the ground that the United States was not a creditor of the Railway for 1942 taxes until return was filed March 15, 1943. Here again the McLaughlin Act is disregarded. "Creditors" the Act provides "shall include all holders of claims, demands and obligations of whatever character against the petitioner or its property, whether or not such claims would otherwise constitute provable claims in bankruptcy, * * *." (705(4)). This Court held in *Gardner* v. *New Jersey,* 329 U. S. 565, 573, that a similar definition in Section 77 made a State a "creditor" on a tax claim. Section 722 of the McLaughlin Act characterizes the United States as a "creditor". By the end of 1942 the Company and subsidiaries had received all income and incurred all expenses which determined their consolidated income and excess profits taxes, if any, for that year. Although not reportable or payable until March 15, 1943, the liability for whatever 1942 taxes there were was created by facts occurring within the year 1942, and of necessity such liability was in being at all times after the end of the year. The United States was therefore a "creditor" under Section 705(4) for 1942 taxes after December 31, 1942.

It has been decided that, when the facts have occurred which create a liability for a tax, the tax is "legally due and owing" and is to be filed in bankruptcy, even though not yet returnable or payable. *New Jersey* v. *Anderson,* 203 U. S. 483, 494; *People of N. Y.* v. *Jersawit,* 263 U. S.

493, 496; *Massachusetts* v. *Meehan* (C. C. A. 1), 67 F. 2d 638, 640; *Bates* v. *Archer* (C. C. A. 6), 288 Fed. 182, 184.

The authorities are to the point that the sovereign, Federal or State, must promptly file its claims in bankruptcy or be barred. *New York* v. *Irving Trust Co.*, 288 U. S. 329, 333; *Gardner* v. *New Jersey*, 329 U. S. 565, 577; *In re Anderson* (C. C. A. 2), 279 Fed. 525, 529; *In re General Film Corporation* (C. C. A. 2), 274 Fed. 903, 904; *United States* v. *Eyges* (D. C. Mass.), 286 Fed. 683, 684; *In re Stavin* (D. C. N. Y.), 12 F. 2d 471, 473-4; *McCarl* v. *Halstead* (C. C. A., D. C.), 45 F. 2d 665, 666-7; *In re Morgenstern & Co.* (C. C. A. 2), 57 F. 2d 163, 164; *In re De Angeles* (C. C. A. 10), 36 F. 2d 218, 219.

It is plain that the Special Court did not disregard or misconstrue the general sections of the Revenue Code, for filing returns by March 15, or for action by the Commissioner afterward. It had no occasion to construe or apply such general provisions. What the Court did was to apply the special tax provisions of the McLaughlin Act to a case under that Act. There is therefore no reason, on account of anything done in this case, for a review by the Supreme Court, to construe the general provisions of the Internal Revenue Code for guidance of the Treasury Department.

Even under the Government's own construction of Section 738 of the McLaughlin Act, bringing Section 274 of the Revenue Code into operation in the case, it was the Commissioner's duty to make an immediate assessment of any 1942 deficiency after the 1942 return was filed on March 15, 1943, and file claim therefor with the Special Court. Such course at least would have enabled the Railway to pay any tax then found due out of its war earnings, instead of thereafter stripping itself of funds to pay the Government's Reconstruction Finance Corporation some $19,000,000 in principal and interest in execution of the Plan.

The Government had ample means and legal power to assemble data for a 1942 claim prior to confirmation of the Plan on March 8. All information necessary for determination of 1942 income and excess profits taxes was available to it at the Company's office in Denver on and after January 25, 1943 (R. 223). Section 3614(a) of the Internal Revenue Code empowered the Commissioner, "for the purpose of making a return where none has been made" to examine the taxpayer's books, and require the taxpayer to give testimony in regard thereto. In fact the Government made such investigation six weeks before the hearing (R. 221) and then dropped the matter. Having instituted a proceeding for approval of a Plan, which required the Government to file its claim before March 8, the Railway was bound on request to place its records at the disposal of the United States for preparation of such claim, whether March 15 had arrived or not.

If not ready when hearing on the Plan was reached, the Government could have asked postponement. If afterwards surprised by the 1942 return filed March 15, 1943, or if failure to file a claim for taxes was due to an excusable Treasury Department oversight, the decree could have been opened and the Plan modified if practicable, or vacated if necessary, to take care of taxes found due, within the six months then allowed by Rule 60 of the Rules of Civil Procedure. *Norris* v. *Camp* (C. C. A. 10), 144 F. 2d 1, 4.

Furthermore in principal part, the tax claims first asserted in 1946 by the United States do not depend on the 1942 return. They go back to the returns of 1940 and 1941, and there reduce the Company's equity invested capital by some $42,500,000, eliminate depreciation of property to the extent of $632,000, exclude retirement loss deductions amounting to $1,159,000, and extinguish carry-over excess profits credits from 1940 and 1941 to the extent of approxi-

mately $3,000,000 in each year (R. 251, 252). No March 15, 1943, return-day argument is available to uphold the plan-wrecking changes which the United States proposes to make in the 1940 and 1941 tax returns.

Moreover the appendices attached to the Plan, served on the Secretary of the Treasury at the inception of the proceeding, notified him that the Railway at that time claimed an invested capital of $48,000,000 on stock and $16,200,263 in accumulated earnings and profits, and exhibited to him the inclusion of the annual depreciation claimed on rolling stock for the preceding ten years (Appendices to Plan of Adjustment, Appdx. III, p. 55 and Appdx. IV, pp. 58-60, served separately from the printed Record). He was not required to await the 1942 return to learn any of those things.

IV.

The Special Court Made No Departure from the Established Rule of Res Judicata. Review Is Not Required to Keep That Rule Straight.

With respect to *res judicata* the Government assumes a number of false premises. The principal error is the assumption, repeated in the petition seven times, that the United States was not a party to the proceeding in which the Plan was established. Again eyes are closed to the McLaughlin Act. Section 722 makes the Secretary of the Treasury the representative of the United States in every Chapter XV case. It requires that copies of papers and notice of hearing be served on him (§§ 736, 737); and a finding that these requirements have been met is a necessary condition to the entry of a decree of confirmation (§ 725 (7)). If there are taxes (to be claimed by the Secretary) *the plan is not to be approved unless the taxes are provided for* (§ 722). To that end the Special Court is to determine the

amount and legality of taxes as between the Secretary and the Company, and to order payment of those found owing (§ 738). The Secretary was duly served in the manner prescribed by § 736 (R. 74, 124). That made the United States a party. Statutory authorization for a proceeding, to which the Government is a necessary party, constitutes consent to make it a party; and the prescribed notice to the designated officer constitutes the process (*United States* v. *Hellend*, 322 U. S. 363, 368). The Court has held that notice given by publication and mail in accordance with statute (*Chicot County Drainage Dist.* v. *Baxter State Bank*, 103 F. 2d, 847, 848) made bondholders parties to a proceeding for "Municipal Debt Readjustments," though not appearing, so as to be bound by the decree on principles of *res judicata* (*Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371, 378). Since a plan may not be approved unless taxes found owing are provided for (§ 722) and since the amount and legality of taxes cannot be determined without the presence of the United States (§ 738), it follows of necessity that service of the papers and notices provided for (§§ 736 and 737) makes the Government a party; otherwise enactment of Chapter XV was a futility. It never was the Congressional intent that the Secretary should determine for himself whether or not the United States would become a party. It would be a new doctrine that one served with process in a case could eliminate himself therefrom by making default. If by remaining away and keeping silent about taxes, the Secretary could prevent the United States' being a party, no plan could ever be confirmed in view of section 722, if there were taxes. The McLaughlin Act made the Government amenable to process, the same as all others having an interest in the plan. The Government has confused default by one served with absence of service in the first place.

Another erroneous assumption is that the present ancil-

lary proceeding is a declaratory judgment case. A suit for declaratory judgment asks a declaration of rights in advance, as a guide to future conduct. Enforcement requires a second proceeding, in event the declared rights are subsequently violated (Judicial Code §§ 2201-2; *Great Lakes D. & D. Co.* v. *Huffman*, 319 U. S. 293, 295). The Colorado and Southern's rights were determined in the decree of March 8, 1943, confirming to it a Plan of Adjustment, whereby it was to have its entire slender resources, after payment of interest in part and no dividends, applied in reduction of its debt, to the exclusion of then unheard of prior taxes and undisclosed changes in prior tax returns (R. 80-95). The Supplemental Petition was not a request for a redeclaration of those rights already adjudged, but was an application to protect and enforce those rights against taxes and tax-return changes antedating the Plan (R. 106-119). The Supplemental Petition takes its root in section 746 of the McLaughlin Act empowering the Special Court to protect and enforce rights under the previously decreed Plan, and in the rule of law that a court in an ancillary proceeding has full power to protect and enforce its decree in the main case (*Local Loan Co.* v. *Hunt*, 292 U. S. 234, 239). A presently coercive judgment was sought (R. 117-119) and was awarded (R. 263-264); and not a mere declaration to be enforced by another petition later.

Another erroneous assumption is that the taxes claimed are something outside the Plan. On the contrary, the liability for 1942 taxes, if there were any taxes for that year, was created by income received during 1942, and necessarily was complete as an existing liability at the termination of business December 31, 1942. It was therefore a claimed tax liability to be asserted by the Government at the hearing in the following March, and was a tax liability, if found good, to be provided for in the

Plan under section 722. Both the 1942 and enlarged 1943 taxes, now claimed by the Government, rest chiefly on changes sought to be made in 1946 by the United States in the 1940 and 1941 tax returns, reducing equity invested capital, eliminating expense and loss deductions on account of depreciation and retirement of property, and destroying carry-over credits and losses set forth in those returns. All of this went back of the Plan by two years; but now projects itself adversely into the execution of the Plan years after formation. If the six-year old claims prevail, they will consume resources relied on in 1943 by parties and court for performance of the Plan, and render its future execution impossible. The claimed taxes are not something apart from the Plan.

A fourth erroneous assumption is that the Special Court undertook to adjudicate taxes. No taxes were adjudicated as such. The Court exercised its jurisdiction under section 746 of the McLaughlin Act to protect and enforce the rights of the parties under the Plan. True, it dealt with tax claims; but it did so because the rights to be protected were threatened with invasion by tax claims which had previously been adjudicated against the United States. The action of the Special Court was taken none the less to protect rights under the Plan, even though the thing to be protected against was a tax claim. This was not adjudication of taxes.

Traditional rules of *res judicata* were not departed from by the Special Court. The Plan proposed by the Railway made no provision for taxes and the petition stated that the United States was not a creditor for taxes (R. 10, 80-95). This constituted an allegation and position that there would be no taxes, under previously filed returns and current income, for which funds need be appropriated in the Plan, or diverted therein from other Plan purposes. The Government did not contest the proposition; and made no

proposal that the Plan be modified, to divert resources and income from creditors and reduction of debt, to payment of taxes which the Government might claim for 1942 or subsequent years, by changing the bases and methods used in the 1940 and 1941 returns. The United States' default confessed that no modification of the Plan was necessary on account of taxes, growing out of past transactions or changes to be made by it in regard thereto. The decree, approving the Plan as proposed, adjudicated that the Plan need not be modified, to the detriment of creditors or Company, to provide funds for taxes for 1942 or later years based on any facts then existing of which the Government then had or could obtain knowledge.

Despite the 1943 decree, the Government proposes now to modify the Plan in effect by compelling the Company to divert income, set aside by the Plan for other creditors and reduction of debt, to payment of claimed taxes based on changes it proposes to make in the 1940, 1941 and 1942 returns. The Special Court ruled that the Government was barred from so doing by the adjudication contained in the decree which established the Plan. This was no violation of the rule of *res judicata*.

The United States had been served; and, notwithstanding its default, had its day in court. Judgment by default is as binding as any other, *Leadville Coal Co.* v. *McCreery*, 141 U. S. 475, 478; *Last Chance Mining Co.* v. *Tyler Mining Co.*, 157 U. S. 683, 694-5.

Chicot County Drainage District v. *Baxter State Bank*, 308 U. S. 371, 378, applied *res judicata* upon a decree establishing a "plan of readjustment," entered in default of the party involved. A proceeding took place in bankruptcy under Act of May 24, 1934 for adjustment of indebtedness of the drainage district. Bondholders were notified by publication and mail. Like the United States here, certain bondholders did not appear (103 F. 2d 847, 848). Their bonds were decreed cancelled with the others

and ordered refinanced. Thereafter that Act was adjudged unconstitutional in other litigation; whereupon the non-appearing bondholders brought an independent suit against the drainage district on their original bonds, on the theory that the bankruptcy court had been without jurisdiction under the unconstitutional statute to cancel the bonds. But this court held that the decree approving the plan and cancelling the bonds, remaining unappealed from, was *res judicata,* even though the bondholders had not appeared, which precluded later recovery on the bonds.

In *American Service Co.* v. *Henderson* (C. C. A. 4), 120 F. 2d, 525, 532, the court held that a decree confirming a plan of reorganization under Section 77B barred Henderson's suit on a claim against the debtor for an escrow fund, because Henderson did not assert his claim to the fund in the reorganization proceedings, nor sue until after the reorganization plan had been confirmed by decree.

In *Black* v. *Richfield Oil Corporation* (C. C. A. 9), 146 F. 2d, 801, 805, Black had a contract with a petroleum company, which went through reorganization under Section 77B. During reorganization he took no action in that proceeding looking to reformation of the contract. The Richfield Corporation as a part of the reorganization acquired the assets of the petroleum company, including the contract. Thereafter Black sought reformation in an independent suit. It was held that he was barred from such relief by the 77B decree. This court denied certiorari (325 U. S. 867).

The Court of Appeals for the Tenth Circuit in *Norris* v. *Camp,* 144 F. 2d 1, 4, held that a decree confirming a plan in a Town's composition proceeding, whereby certain of its bonds were ordered refinanced, was *res judicata* of the validity of the bonds, so long as the decree stood. It is plain that a decree approving a plan is *res judicata* of all matters entering into the Plan—especially those upon which it depends for its execution.

Petitioner invokes *Commissioner* v. *Sunnen*, 333 U. S. 591. It is without application because there the two actions involved different causes of action, with a change of law intervening. Here the cause of action is the same one in each instance without change of law coming in. The latest applicable decision on *res judicata* is the *Chicot* case, 308 U. S. 371, 378, resting on a decree confirming a plan. In the plan proceeding the bondholder parties defaulted and did not question the constitutionality of the Act, in an effort to preserve their bonds from reduction in amount. In a second suit on the same bonds for full amount, they were precluded by *res judicata* from asserting unconstitutionality of the same Act. The Court said:

> "The remaining question is simply whether respondents having failed to raise the question in the proceeding to which they were parties and in which they could have raised it and had it finally determined, were privileged to remain quiet and raise it in a subsequent suit. Such a view is contrary to the well-settled principle that *res judicata* may be pleaded as a bar, not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding, 'but also as respects any other available matter which might have been presented to that end.' *Grubb* v. *Public Utilities Commission*, 281 U. S. 470, 74 L. ed. 972, 50 S. Ct. 374, *supra; Cromwell* v. *Sac County*, 94 U. S. 351, 24 L. ed. 195, *supra.*"

The claimed rights now contended for by the Government, and rejected in the questioned judgment, are precisely the same claimed rights it would have had to assert, if it had appeared in the Plan proceeding and sought taxes based thereon, viz., the claimed right to write down the equity invested capital, depreciation and retirements in the 1940, 1941 and 1942 returns in order to prevent the same, and resulting carry-over excess profits credits and operating loss deductions of the earlier years, from being used in 1942 and 1943.

The Railway's equity invested capital and methods and

rates of depreciation and retirement losses, long claimed and used by it, were on file with the Government in the tax returns of 1940 and 1941, prior to the promulgation of the Plan of Adjustment in 1942 and 1943. Exhibits 8 and 9 (introduced R. 219; not printed by Petitioner). Those returns set forth also the carry-over credits and losses deductions flowing therefrom. All were of great importance to the Company in holding down war taxes during execution of the Plan. The carry-overs were assets, having the attributes of property usable in discharging taxes which would otherwise become payable. Like the contract in the *Black* case, they "acquired a definite status in the reorganization proceedings" (41 Fed. Supp. 988, 996) not thereafter changeable, in the face of the decree approving the Plan. Unchallenged as they were by the United States, Company and Court had every right to rely on them in coming to the conclusion that the Plan would work and should be adopted. Unchallenged, no amendment of the Plan was necessary. Had they been challenged, and the challenge found good, modification of the Plan would have been imperative, to the disadvantage of Company and creditors, if there was to be a plan at all. The decree, confirming the Plan without modification, was therefore an adjudication that the available income of the Railway thereafter was to be applied under the Plan to payment of the reduced interest and to reduction of debt, and not to subsequently claimed 1942 taxes, or later taxes asserted by changing the 1940 and 1941 returns.

Respondent urges that the petition for writ of certiorari be dismissed and the writ denied.

Respectfully submitted,

J. C. James,
Walter McFarland,
John L. Rice,
Counsel for Respondent.

September, 1949.

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 149

THE UNITED STATES OF AMERICA, PETITIONER

v.

THE COLORADO AND SOUTHERN RAILWAY COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

REPLY FOR THE UNITED STATES TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

The brief in opposition argues (pp. 6-11) that the United States is not authorized to petition for a writ of certiorari in this case, because it is not a creditor "affected" by the plan, as defined in Section 706 of the Bankruptcy Act (Pet. 20). We believe there is no substance to the argument.

Section 745 of the Bankruptcy Act (Pet. 31) provides that any final order or decree of the special court may be reviewed by this Court upon application for certiorari made by any person affected

by the plan who deems himself aggrieved within 60 days after entry of the order or decree. The right to petition for certiorari is thus not limited to "creditors" who are "affected' by the plan within the meaning of Section 706, as taxpayer contends.

The findings of fact, conclusions of law, and judgment entered April 29, 1949, of which the petition for certiorari asks review, denied the right to the United States to assess and collect 1942 and 1943 taxes claimed to be due because *inter alia* such taxes were not included as a liability of the taxpayer when the plan of adjustment was approved in 1943, and their assessment and collection now would jeopardize the effective execution of the plan of adjustment. This judgment was a final judgment and under Section 745 any final judgment or decree may be the subject of an application for certiorari, not merely the original decree approving the plan. (Cf. Br. in Opp. 9) Since under the District Court's judgment the United States is prevented by the plan from assessing and collecting taxes claimed by it, the United States is clearly a person affected by the plan, and deeming itself aggrieved by the judgment, is authorized to petition for certiorari under the plain language of Section 745. This right exists whether or not the United States was a "creditor" affected by the plan, but we also believe that the United States was a creditor.

At the time of the original decree approving the plan entered March 8, 1943, the United States was

not a creditor claiming taxes, as the District Court then found. Subsequently, however, liability for 1942 and 1943 income and excess profits taxes arose and the United States gave notice of proposed additional taxes due for those years and declined to settle the proposed liabilities in accordance with taxpayer's protest. At the time the supplemental petition was filed on October 4, 1948, the United States was thus asserting claims for taxes from the petitioning taxpayer. It was then a creditor under Section 705(4) of the Bankruptcy Act. (Pet. 20.) See also Sections 722 (Pet. 25-26) and 738 (Pet. 31.) The District Court's judgment has of course prevented assessment of the taxes claimed by the United States.

Section 706 in terms provides that no creditor shall be deemed to be affected by any plan unless the plan proposes to modify the evidence of debt or other instrument defining the creditor's rights, or to modify the creditor's security, if any, for the claim. A complete elimination of the claim would patently be a "modification" under this section. But in any case, it is obvious that the section can relate and apply only to claims of creditors which are evidenced by a written document or are secured. It seems apparent that, where Congress did not expressly define the circumstances in which other kinds of creditors would be deemed to be affected by the plan, such question is left to judicial determination, and that such creditors are affected by the plan where their claims are dealt with and are

reduced, modified, or eliminated. Certainly there is no basis in Section 706 for imputing to Congress an intention to eliminate unsecured creditors without written evidence of the debt from the right to petition for certiorari where the plan of adjustment, as approved, reduces, modifies, or expunges entirely their claims.

The claims of the United States for taxes in this case are not evidenced by written document and are not secured. Section 706 therefore has no application. The claims were, however, rejected altogether, not on the merits but on the basis of the supposed *res judicata* effect of the former decree approving the plan, because they would jeopardize the plan already approved. Thus, the claims were affected, that is, defeated, by the plan. It follows that the United States, as a creditor at the time of the supplemental petition, was granted the right to petition for certiorari with respect to the judgment entered on the supplemental petition under Section 745, even if the narrow view urged is taken that only creditors may apply for certiorari under that section.

The fact that Congress did not amend the bill to provide that all claims of the United States are to be deemed to be affected by a plan under Chapter XV of the Bankruptcy Act, as suggested by the Assistant Tax Legislative Counsel of the Treasury to the Special Subcommittee on Bankruptcy and Reorganization of the House Judiciary Committee (Br. in Opp. 6-8), does not compel the con-

clusion that Congress intended that the United States was never to have a right to petition for certiorari under Section 745, in view of the language used in the section. As shown, it expressly gave the right to apply for certiorari to all persons affected by the plan who deem themselves aggrieved and, in the circumstances here, this includes the United States under any interpretation of Section 745. Failure to adopt the suggested amendment would at most be one circumstance to be weighed with others, were the choice as to the meaning of the statutory language nicely balanced. *Fox* v. *Standard Oil Co.*, 294 U. S. 87, 96. Here, however, there is nothing to support the view that Congress intended to withhold from the United States the right to petition for certiorari in circumstances where it is affected by the plan and feels aggrieved.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.
THERON LAMAR CAUDLE,
Assistant Attorney General.
ELLIS N. SLACK,
HELEN GOODNER,
Special Assistants to the Attorney General.

OCTOBER, 1949.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1949 837044 399